

9247



AMERICAN
CRIMINAL REPORTS.

A SERIES

DESIGNED TO CONTAIN THE

LATEST AND MOST IMPORTANT

CRIMINAL CASES

DETERMINED IN

THE FEDERAL AND STATE COURTS
IN THE UNITED STATES,

AS WELL AS

SELECTED CASES, IMPORTANT TO AMERICAN LAWYERS,

FROM THE

ENGLISH, IRISH, SCOTCH AND CANADIAN LAW REPORTS,

WITH NOTES AND REFERENCES.

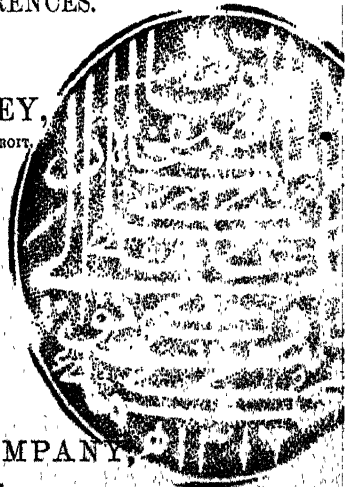
BY JOHN G. HAWLEY,

LATE PROSECUTING ATTORNEY AT DETROIT.

VOL. I.

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6th of April following, looked very much older than sixteen; and the jury found, upon reasonable evidence, that before the defendant took her away, she had told him that she was eighteen, and that the defendant *bona fide* believed that statement, and that such belief was reasonable.

If the court should be of opinion that under these circumstances a conviction was right, the defendant was to appear for judgment at the next assizes for Surrey; otherwise, the conviction was to be quashed; see *Reg. v. Robins*, C. & K., 546, and *Reg. v. Olfier*, 10 Cox Cr. C., 402.

April 25, the court (Cockburn, C. J., Bramwell and Pollock, BB., Mellor and Brett, JJ.) reserved the case for the consideration of all the judges.

May 29, the case was argued before Cockburn, C. J., Kelly, C. B., Bramwell, Cleasby, Pollock and Amphlett, BB., Blackburn, Mellor, Lush, Brett, Grove, Quain, Denman, Archibald, Field and Lindley, JJ.

No counsel appeared for the prisoner.

Lilley, for the prosecution, cited *Attorney General v. Lockwood*, 9 M. & W., 378; *Reg. v. Marsh*, 4 D. & R., 260; *Reg. v. Hopkins*, Car. & M., 254; *Lee v. Simpson*, 3 C. B., 871; 16 L. J. (C. P.), 105; *Reg. v. Robins*, (1); *Reg. v. Kipps*, 4 Cox Cr. C., 167; *Reg. v. Olfier*, (2); *Reg. v. Mycock*, 12 Cox Cr. C., 28; *Reg. v. Booth*, 12 Cox Cr. C., 231.

Cockburn, C. J., referred to *Reg. v. Hibbert*, Law Rep., 1 C. C., 184.

Pollock, B., referred to *Rees v. Lord Gray*, 9 St. Tr., 127.

June 26. The following judgments were delivered:

BRETT, J. In this case, the prisoner was indicted under 24 and 25 Vict., ch. 100, sec. 55, for that he did unlawfully take an unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father, and, according to the statements of the case, we are to assume that it was proved on a trial that he did take an unmarried girl out of the possession and against the will of her father, and that when he did so, the girl was under the age of sixteen years. But the jury found that the girl went with the prisoner willingly; that she told the prisoner that she was eighteen years of age; that he believed that she was eighteen years of age, and that he had reasonable

ground for so believing. The question is, whether upon such proof and such findings of the jury, the prisoner ought or ought not, in point of law, to be pronounced guilty of the offense with which he was charged. He, in fact, did each and every thing which is enumerated in the statute as constituting the offense to be punished, if what he did was done unlawfully within the meaning of the statute. If what he did was unlawful within the meaning of the statute, it seems impossible to say that he ought not to be convicted. If what he did was not unlawful within the meaning of the statute, it seems impossible to say that he ought to be convicted. The question, therefore, is, whether the findings of the jury, which are in favor of the prisoner, prevent what he is proved to have done, from being unlawful within the meaning of the statute. It cannot, as it seems to me, properly be assumed that what he did was unlawful within the meaning of the statute, for that is the very question to be determined.

Now, on the one side, it is said that the prisoner is proved to have done every particular thing which is enumerated in the act as constituting the offense to be punished, and that there is no legal justification for what he did, and, therefore, that it must be held, as a matter of law, that what he did was unlawful within the meaning of the statute, and that the statute was therefore satisfied, and the crime completed. On the other side, it is argued that if the facts had been as the prisoner believed them to be, and as by the findings of the jury he might reasonably believe them to be, and was deceived into believing them to be, he would have been guilty of no criminal offense at all, and therefore he had no criminal intent at all, and therefore what he did was not criminally unlawful within the meaning of the criminal statute under which he was indicted.

It has been said that even if the facts had been as the prisoner believed them to be, he would still have been doing a wrongful act. The first point, therefore, to be considered would seem to be; what would have been the legal position of the prisoner, if the facts had been as he believed them to be; that is to say, what is the legal position of a man who without force takes a girl more than sixteen years of age, but less than twenty-one years of age, out of the possession of her father and against his will? The statute, 4 and 5 Phil. & Mary, ch. 8, has been said to recognize the legal right of a father to the possession of an unmarried

daughter up to the age of sixteen. The statute, 12 Car. II, ch. 24, seems to recognize the right of a father to such possession up to the age of twenty-one. Mr. Hargreave, in notes 12 and 15 to Co. Lit., 88 b, seems to deduce a right in the father to possession up to the age of twenty-one from those two statutes, and that such right is to be called in law a right *jure naturæ*. If the father's right be infringed, he may apply for a *habeas corpus*. When the child is produced in obedience to such writ, issued upon the application of a father, if the child be under twenty one, the general rule is, that, "if the child be of an age to exercise a choice, the court leaves it to elect where it will go; if it be not of that age, and a want of discretion would only expose it to dangers or seductions, the court must make an order for its being placed in the proper custody, and that undoubtedly is the custody of the father:" Lord Denman, C. J., in *Rea v. Glenhill*, 4 A. & E., 624; but if the child be a female under sixteen, the court will order it to be handed over to the father, in the absence of certain objections to his custody, even though the child object to return to the father. If the child be between sixteen and twenty-one, and refuse to return to the father, the court, even though the child be a female, gives to the child the election as to the custody in which it will be. "Now, the cases which have been decided on this subject show that although the father is entitled to the custody of his children till they obtain the age of twenty-one, this court will not grant a *habeas corpus* to hand a child which is below that age over to its father, provided that it has attained an age of sufficient discretion to enable it to exercise a wise choice for its interest. The whole question is, what is that age of discretion? We repudiate utterly, as most dangerous, the notion that any intellectual precocity in an individual female child can hasten the period which appears to have been fixed by statute for the arrival of the age of discretion; for that very precocity, if uncontrolled, might very probably lead to her irreparable injury. The legislature has given us a guide, which we may safely follow, in pointing out sixteen as the age up to which the father's right to the custody of his female child is to continue; and short of which such a child has no discretion to consent to leaving him." Cockburn, C. J., in *Reg. v. Howes*, 3 C. & E., 332. But if a man take out of her father's possession without force and with her consent a daughter between sixteen

and twenty-one, the father would seem to have no legal remedy for such taking. It may be that the father, if present at the taking, might resist such taking, by necessary force, so that to an action for assault by the man, he might plead a justification. But for a mere such taking without seduction, there is no action which the father could maintain. There never was a writ applicable to such a cause of action. The writ of "ravishment of ward" was only to such as had the right to the marriage of the infant, and was therefore only applicable where the infant was an heir to property, whose marriage was therefore valuable to the guardian. See *Ratcliff's Case*, 3 Co. Rep., 37. No such action now exists, and if it did, it would not be applicable to any female child, at all events, not to any who was heir-apparent. Neither can a man who with her consent, and without force, takes a daughter who is more than sixteen years old but less than twenty-one, out of her father's possession or custody, be indicted for such taking. There never has been such an indictment. The statute, 3 Hen. VII, ch. 2, was enacted against "the taking any woman so against her will unlawfully, that is to say, maid, widow, or wife, that such taking, etc., be felony." It was held in *Lady Fullwood's Case*, Cro. Car., 484, that the indictment must further charge that the defendant carried away the woman with intent to marry or defile her. Two things, therefore, were necessary, which are not applicable to the point now under discussion, namely, that the taking should be against the will of the person taken, and that there should be the intent to marry or defile. The statute, 4 and 5 Phil. & Mary, ch. 8, deals with the taking out of or from the possession, custody or government of the father, etc., any maid or woman child, unmarried, being under the age of sixteen years. For a mere unlawful taking, the punishment is imprisonment for two years. For a taking and marriage, five years. And the girl, if she be more than twelve years old, and consents to the marriage, forfeits her inheritance. The statute, 9 Geo. IV, ch. 31, sec. 19, is enacted against the taking of a woman against her will with intent to marry or defile her, etc. The same statute, sec. 20, is as to an unmarried girl being under the age of sixteen years. It follows from this review that if the facts had been as the prisoner, according to the findings of the jury, believed them to be, and had reasonable ground for believing them to be, he would have done no act

which has ever been a criminal offense in England; he would have done no act in respect of which any civil action could have ever been maintained against him; he would have done no act for which, if done in the absence of the father, and done with the continuing consent of the girl the father could have had any legal remedy.

We have then next to consider the terms of the statute, and what is the meaning in it of the word "unlawfully." "The usual system of framing criminal acts has been to specify each and every act intended to be subject to any punishment;" Criminal Law Consolidation Acts, by Greaves, Introduction, p. xxxvii; and then in some way to declare whether the offense is to be considered as a felony or as a misdemeanor, and then to enact the punishment. It seems obvious that it is the prohibited acts which constitute the offense, and that the phraseology which indicates the class of the offense does not alter or affect the facts, or the necessary proof of those facts, which constitute the offense. There are several usual forms of criminal enactment: "If any one shall with such or such intent do such and such acts, he shall be guilty of felony or misdemeanor, or as the case may be." Whether the offense is declared to be a felony or a misdemeanor depends upon the view of the legislature as to its heinousness. But the class in which it is placed does not alter the proof requisite to support a charge of being guilty of it. Under such a form of enactment, there must be proof that the acts were done, and done with the specified intent. Other forms are: "If any one shall feloniously do such and such acts, he shall be liable to penal servitude," etc.; or, "If any one shall unlawfully do such and such acts, he shall be liable to imprisonment," etc. The first of these forms makes the offense a felony by the use of the word "feloniously;" the second makes the offense a misdemeanor by the use of the word "unlawfully." The words are used to declare the class of the offense. But they denote also a part of that which constitutes the offense. They denote that which is equivalent to, though not the same as, the specific intent mentioned in the first form, to which allusion has been made. Besides denoting the class of the offense, they denote that something more must be proved than merely that the prisoner did the prohibited acts. They do not necessarily show that evidence need, in the first instance, be

given of more than that the prisoner did the prohibited acts; but they do denote that the jury must find, as a matter of ultimate proof, more than that the prisoner did the prohibited acts. What is it that the jury must be satisfied is proved, beyond merely that the person did the prohibited acts? It is suggested that they must be satisfied that the prisoner did the acts with a criminal mind, that there was "*mens rea*." The true meaning of that phrase is to be discussed hereafter. If it be true that this must be proved, the only difference between the second forms and the first form of enactment is, that in the first the intent is specified, but in the second it is left generally as a criminal state of mind. As between the two second forms, the evidence, either direct or inferential, to prove the criminal state of mind, must be the same. The proof of the state of the mind is not altered or affected by the class in which the offense is placed.

Another common form of enactment is, "If any person knowingly, wilfully and maliciously do such or such acts, he shall be guilty of felony," or "if any knowingly and wilfully do such or such acts, he shall be guilty of misdemeanor," or "if any knowingly, wilfully and feloniously do such or such acts, he shall be liable," etc., or "if any knowingly and unlawfully do such and such acts, he shall be liable," etc. The same explanation is to be given of all these forms as between each other as before. They are mere differences in form. And though they be all, or though several of them be in one consolidating statute, they are not to be construed by contrast. "If any question should arise in which any comparison may be instituted between different sections of any one or several of these acts, it must be carefully borne in mind in what manner these acts were framed. None of them was rewritten; on the contrary, each contains enactments taken from different acts passed at different times and with different views, and frequently varying from each other in phraseology; and, for the reasons stated in the introduction, these enactments for the most part stand in these acts with little or no variation in their phraseology, and consequently their differences in that respect will be found generally to remain in these acts. It follows, therefore, from hence, that any argument as to a difference in the intention of the legislature which may be drawn from a difference in the terms of one clause from those in another, will be entitled to no weight in the construction of

such clauses, for that argument can only apply with force where an act is framed from beginning to end with one and the same view, and with the intention of making it thoroughly consistent throughout." Greaves on Criminal Law Consolidation Acts, p. 3. I have said that as between each other the same explanation is to be given of these latter forms of enactment as of the former mentioned in this judgment. But as between these latter and the former forms, there is the introduction in the latter of such words as "knowingly," "wilfully," "maliciously." "Wilfully" is more generally applied when the prohibited acts are in their natural consequences not necessarily or very probably noxious to the public interest, or to individuals, so that an evil mind is not the natural inference or consequence to be drawn from the doing of the acts. The presence of the word requires somewhat more evidence on the part of the prosecution to make out a *prima facie* case, than evidence that the prisoner did the prohibited acts. So as to the word "maliciously," it is usual where the prohibited acts may or may not be such as in themselves import *prima facie* a malicious mind. In the same way the word "knowingly" is used, where the noxious character of the prohibited acts depends upon knowledge in the prisoner of their noxious effect, other than the mere knowledge that he is doing the acts. The presence of the word calls for more evidence on the part of the prosecution. But the absence of the word does not prevent the prisoner from proving to the satisfaction of the jury, that the *mens rea*, to be *prima facie* inferred from his doing the prohibited acts, did not in fact exist. In *Rea v. Marsh*, 2 B. & C., 717, the measure of the effect of the presence in the enactment of the word "knowingly" is explained. The information and conviction were against a carrier for having game in his possession contrary to the statute, 5 Anne, ch. 14, which declares "that any carrier having game in his possession is guilty of an offense, unless it be sent by a qualified person." The only evidence given was, that the defendant was a carrier, and that he had game in his wagon on the road. It was objected that there was no evidence that the defendant knew of the presence of the game, or that the person who sent it was not a qualified person. The judges held that there was sufficient *prima facie* evidence, and that it was not rebutted by the defendant by sufficient proof on his part of the ignorance sug-

gested on his behalf. The judgments clearly import, that if the defendant could have satisfied the jury of his ignorance, it would have been a defense, though the word "knowingly" was not in the statute. In other words, that its presence or absence in the statute only alters the burden of proof. "Then, as to knowledge, the clause itself says nothing about it. If that had been introduced, evidence to establish knowledge must have been given on the part of the prosecutor; but under this enactment the party charged must show a degree of ignorance sufficient to excuse him. Here there was *prima facie* evidence that the game was in his possession as carrier. Then it lay on the defendant to rebut that evidence:" Bagley, J. "The game was found in his wagon employed in the course of his business as a carrier. That raises a presumption *prima facie* that he knew it, and that is not rebutted by the evidence given on the part of the defendant:" Littledale, J.

From these considerations of the forms of criminal enactments, it would seem that the ultimate proof necessary to authorize a conviction is not altered by the presence or absence of the word knowingly, though by its presence or absence the burden of proof is altered; and it would seem that there must be proof to satisfy a jury ultimately that there was a criminal mind, or *mens rea*, in every offense really charged as a crime. In some enactments, or common law maxims of crime, and therefore in the indictments charging the committal of those crimes, the name of the crime imports that a *mens rea* must be proved, as in murder, burglary, etc. In some the *mens rea* is contained in the specific enactments as to the intent, which is made a part of the crime. In some the word "feloniously" is used, and in such cases it has never been doubted but that a felonious mind must ultimately be found by the jury. In enactments in a similar form, but in which the prohibited acts are to be classed as a misdemeanor, the word "unlawfully" is used instead of the word "feloniously." What reason is there why, in like manner, a criminal mind, or *mens rea*, must not ultimately be found by the jury in order to justify a conviction, the distinction always being observed, that in some cases the proof of the committal of the acts may *prima facie*, either by reason of their own nature, or by reason of the form of the statute, import the proof of the *mens rea*? But even in those cases it is open to the prisoner to rebut the *prima facie*

evidence, so that if, in the end, the jury are satisfied that there was no criminal mind, or *mens rea*, there cannot be a conviction in England for that which is by the law considered to be a crime.

There are enactments which by their form seem to constitute the prohibited acts into crime, and yet by virtue of which enactments the defendants charged with the committal of the prohibited acts have been convicted in the absence of the knowledge or intention supposed necessary to constitute a *mens rea*. Such are the cases of trespass in pursuit of game, or of piracy of literary or dramatic works, or of the statutes passed to protect the revenue. But the decisions have been based upon the judicial declaration that the enactments do not constitute the prohibited acts into crime or offenses against the crown, but only prohibit them for the purpose of protecting the individual interest of individual persons, or of the revenue. Thus, in *Lee v. Simpson*, 3 C. B., 871; 15 L. J. (C. P.), 195, in an action for penalties for the representation of a dramatic piece, it was held that it was not necessary to show that the defendant knowingly invaded the plaintiff's right. But the reason of the decision given by Wilde, C. J., 3 C. B., at p. 883 is: "The object of the legislature was to protect authors against the piratical invasion of their rights. In the sense of having committed an offense against the act, of having done a thing that is prohibited, the defendant is an offender. But the plaintiff's rights do not depend upon the innocence or guilt of the defendant." So the decision in *Morden v. Porter*, 7 C. B. (N. S.), 641; 29 L. J. (M. C.), 218, seems to be made to turn upon the view that the statute was passed in order to protect the individual property of the landlord in game reserved to him by his lease against that which is made a statutory trespass against him, although his land is in the occupation of his tenant. There are other cases in which the ground of decision is that specific evidence of knowledge or intention need not be given, because the nature of the prohibited acts is such that, if done, they must draw with them the inference that they were done with the criminal mind or intent, which is a part of every crime. Such is the case of the possession and distribution of obscene books. If a man possesses them, and distributes them, it is a necessary inference that he must have intended that their first effect must be that which is prohibited by statute, and that he cannot protect himself by showing that his ultimate object or

secondary intent was not immoral. *Reg. v. Hicklin*, Law Rep., 3 Q. B., 360. This and similar decisions go rather to show what is *mens rea*, than to show whether there can or cannot be conviction for crime proper, without *mens rea*.

As to the last question, it has become very necessary to examine the authorities. In Blackstone's Commentaries by Stephen, 2d ed., vol. IV, book 6, Of Crimes, p. 98. "And as a vicious will without a vicious act is no civil crime, so, on the other hand, an unwarrantable act without a vicious will is no crime at all, so that, to constitute a crime against human laws, there must be first a vicious will, and secondly an unlawful act consequent upon such vicious will. Now there are three cases in which the will does not join with the act: 1. Where there is a defect of understanding, etc. 2. Where there is understanding and will sufficient residing in the party, but not called forth and exerted at the time of the action done, which is the case of all offenses committed by chance or ignorance. Here the will sits neuter, and neither concurs with the act nor disagrees to it." And at p. 105; "Ignorance or mistake is another defect of will, when a man, intending to do a lawful act, does that which is unlawful; for here the deed and the will acting separately, there is not that conjunction between them which is necessary to form a criminal act. But this must be an ignorance or mistake in fact, and not an error in point of law. As if a man, intending to kill a thief or housebreaker in his own house, by mistake, kills one of his family, this is no criminal action, but if a man thinks he has a right to kill a person excommunicated or outlawed wherever he meets him, and does so, this is wilful murder." In *Fowler v. Padget*, 7 T. R., 509, the jury found that they thought the intent of the plaintiff in going to London was laudable; that he had no intent to defraud or delay his creditors, but that delay did actually happen to some creditors. Lord Kenyon said, "Bankruptcy is considered as a crime, and the bankrupt in the old laws is called an offender; but it is a principle of natural justice and of our laws that *actus non reum facit, nisi mens sit rea*. The intent and the act must both concur to constitute the crime." And again: "I would adopt any construction of the statute that the words will bear, in order to avoid such monstrous consequences as would manifestly ensue from the construction contended for."

In *Hearne v. Garton*, 2 E. & E., 16, 28, L. J. (M. C.), 216, the respondents were charged upon an information, for having sent oil of vitriol by the Great Western Railway, without marking or stating the nature of the goods. By 20 and 21, Vict., ch. 43, sec. 168, "every person who shall send or cause to be sent by the said railway, any oil of vitriol, shall distinctly mark or state the nature of such goods, etc., on pain of forfeiting, etc." By sec. 206, such penalty is recoverable in a summary way before justices, with power to imprison, etc. The respondent had in fact sent oil of vitriol unmarked, but the justices found that there was no guilty knowledge, but, on the contrary, the respondents acted under the full belief that the goods were correctly described, and had previously used all proper diligence to inform themselves of the fact. They refused to convict. It must be observed that in that case, as in the present, the respondents did in fact the prohibited acts, and that in that case, as in this, it was found, as the ultimate proof, that they were deceived into the belief of a different and non-criminal state of facts, and had used all proper diligence. The case is stronger, perhaps, than the present, by reason of the word "unlawfully" being absent from that statute. The court upheld the decision of the magistrates, holding that the statute made the doing of the prohibited acts a crime, and therefore that there must be a criminal mind, which there was not. "As to the latter reason, I think the justices were perfectly right; *actus non reum facit, nisi mens sit rea*. The act with which the respondents were charged is an offense created by statute, and for which the person committing it is liable to a penalty or to imprisonment; not only was there no proof of guilty knowledge on the part of the respondents, but the presumption of a guilty knowledge on their part, if any could be raised, was rebutted by the proof that a fraud had been practised on them. I am inclined to think they were civilly liable." Lord Campbell, C. J. "I was inclined to think at first, that the provision was merely protective; but if it created a criminal offense, which I am not prepared to deny, then the mere sending by the respondents, without a guilty knowledge on their part, would not render them criminally liable, although, as they took Nicholas's word for the contents of the parcel, they would be civilly liable." Erle, J.

In *Taylor v. Newman*, 4 B. & S., 89, 32, L. J. (M. C.), 186,

the information was under 24 and 25, Vict., ch. 96, sec. 23. "Who-soever shall unlawfully and wilfully kill, etc., any pigeon, etc." The appellant shot pigeons on his farm belonging to a neighbor. The justices convicted, on the ground that the appellant was not justified by law in killing the pigeons, and, therefore, that the killing was unlawful. In other words they held that the only meaning of "unlawfully" in the statute was "without legal justification." The court set aside the conviction. "I think that the statute was not intended to apply to a case in which there was no guilty mind, and where the act was done by a person under the honest belief that he was exercising a right." Mellor J.

In *Buckmaster v. Reynolds*, 13 C. B. (N. S.), 62, an information was laid for unlawfully, by a certain contrivance, attempting to obstruct or prevent the purposes of an election at a vestry. The evidence was that that defendant did obstruct the election because he forced himself and others into the room before eight o'clock, believing that eight o'clock was passed. The question asked was, whether an intentional obstruction by actual violence is an offense, etc. This question the court answered in the affirmative, so that there, as here, the defendant had done the prohibited acts. But Erle, J., continued: "I accompany this statement (i. e., the answer to the question) by a statement that upon the facts set forth I am unable to see that the magistrate has come to a wrong conclusion. A man cannot be said to be guilty of a delict, unless to some extent his mind goes with the act. Here it seems that the respondent acted in the belief that he had a right to enter the room, and that he had no intention to do a wrongful act."

In *Reg. v. Hibbert*, Law Rep., 1 C. C., 184, the prisoner was indicted under the section now in question. The girl, who lived with her father and mother, left her home in company with another girl to go to a Sunday school. The prisoner met the two girls and induced them to go to Manchester. At Manchester he took the girl to a public house and there seduced the girl in question, who was under sixteen. The prisoner made no inquiry and did not know who the girl was, or whether she had a father or mother living or not, but he had no reason to, and did not believe that she was a girl of the town. The jury found the prisoner guilty, and Lush, J., reserved the case. In the Court of Criminal Appeals, Bovill, C. J., Channell and Pigott, BB., Byles and

Lush, JJ., quashed the conviction. Bovill, C. J.: "In the present case there is no statement of any finding of fact that the prisoner knew, or had reason to believe, that the girl was under the lawful care or charge of her father or mother, or any other person. In the absence of any finding of fact on this point, the conviction cannot be supported." This case was founded on *Reg. v. Green*, 3 F. & F., 274, before Martin, B. The girl was under fourteen, and lived with her father, a fisherman, at South-end. The prisoners saw her in the street, by herself, and induced her to go with them. They took her to a lonely house, and there Green had criminal intercourse with her. Martin, B., directed an acquittal: "There must," he said, "be a taking out of the possession of the father. Here the prisoners picked up the girl in the street, and for anything that appeared, they might not have known that the girl had a father. The girl was not taken out of the possession of any one. The prisoners, no doubt, had done a very immoral act, but the question was, whether they had committed an illegal act. The criminal law ought not to be strained to meet a case which did not come within it. The act of the prisoners was scandalous, but it was not any legal offense." In each of these cases the girl was surely in the legal possession of her father. The fact of her being in the street at the time could not possibly prevent her from being in the legal possession of her father. Everything, therefore, prohibited, was done by the prisoner in fact. But in each case the ignorance of facts was held to prevent the case from being the crime to be punished.

In *Reg. v. Tinckler*, 1 F. & F., 513, in a case under this section, Cockburn, C. J., charged the jury thus: "It was clear the prisoner had no right to act as he had done in taking the child out of Mrs. Barnes' custody. But inasmuch as no improper motive was suggested on the part of the prosecution, it might very well be concluded that the prisoner wished the child to live with him, and that he meant to discharge the promise which he alleged he had made to her father, and that he did not suppose he was breaking the laws when he took the child away. This being a criminal prosecution, if the jury should take this view of the case, and be of opinion that the prisoner honestly believed that he had a right to the custody of the child, then, although the prisoner was not legally justified, he would be entitled to an acquittal." The jury found the prisoner not guilty.

In *Reg. v. Sleep*, 8 Cox Cr. C., 472, the prisoner had possession of government stores, some of which were marked with the broad arrow. The jury, in answer to a question whether the prisoner knew that the copper, or any part of it, was marked, answered, "We have not sufficient evidence before us to show that he knew it."

The Court of Criminal Appeal held that the prisoner could not be convicted. Cockburn, C. J.: "*Actus non reum facit, nisi mens sit rea* is the foundation of all criminal procedure. The ordinary principle that there must be a guilty mind to constitute a guilty act applies to this case, and must be imported into this statute, as it was held in *Reg. v. Cohen*, 8 Cox Cr. C., 41; where this conclusion of the law was stated by Hill, J., with his usual clearness and power. It is true that the statute says nothing about knowledge, but this must be imported into the statute." Pollock, C. B., Martin, B., Crompton and Willes, JJ., agreed.

In the case of *Reg. v. Robins*, C. & K., 456, and *Reg. v. Officer*, 10 Cox Cr. C., 402, there was hardly such evidence as was given in this case, as to the prisoner being deceived as to the age of the girl, and having reasonable ground to believe the deception, and there certainly were no findings by the jury equivalent to the findings in this case.

In *Reg. v. Forbes and Webb*, 10 Cox Cr. C., 362, although the policeman was in plain clothes, the prisoner had strong ground to suspect, if not to believe, that he was a policeman, for the case states that they repeatedly called out to rescue the boy and pitch into the constable.

Upon all the cases, I think it is proved that there can be no conviction for crime in England in the absence of a criminal mind, or *mens rea*.

Then comes the question, what is the true meaning of the phrase? I do not doubt that it exists where the prisoner knowingly does acts which would constitute a crime if the result were as he anticipated, but in which the result may not improbably end by bringing the offense within a more serious class of crime. As if a man strikes with a dangerous weapon, with intent to do grievous bodily harm, and kills, the result makes the crime murder. The prisoner has run the risk. So, if a prisoner do the prohibited acts, without caring to consider what the truth is as

to facts — as if a prisoner were to abduct a girl under sixteen without caring to consider whether she was in truth under sixteen, he runs the risk; so, if he, without abduction, defiles a girl who is in fact under ten years old, with a belief that she is between ten and twelve. If the facts were as he believed, he would be committing the lesser crime. Then he runs the risk of his crime resulting in the greater crime. It is clear that ignorance of the law does not excuse. It seems to me to follow that the maxim as to *mens rea* applies whenever the facts which are present to the prisoner's mind, and which he has reasonable ground to believe, and does believe to be the facts, would, if true, make his acts no criminal offense at all.

It may be true to say that the meaning of the word "unlawfully" is, that the prohibited acts be done without justification or excuse. I, of course, agree that if there be a legal justification there can be no crime; but I come to the conclusion that a mistake of facts, on reasonable grounds, to the extent that if the facts were as believed, the acts of the prisoner would make him guilty of no criminal offense at all, is an excuse, and that such excuse is implied in every criminal charge and every criminal enactment in England. I agree with Lord Kenyon that "such is our law," and with Cockburn, C. J., that "such is the foundation of all criminal procedure."

The following judgment (in which Cockburn, C. J., Mellor, Lush, Quain, Denman, Archibald, Field and Lindley, JJ., and Pollock, B. concurred) was delivered by

BLACKBURN, J. In this case we must take it as found by the jury, that the prisoner took an unmarried girl out of the possession and against the will of her father, and that the girl was in fact under the age of sixteen, but that the prisoner, *bona fide*, and on reasonable grounds, believed that she was above sixteen, viz., eighteen years old. No question arises as to what constitutes a taking out of the possession of her father, nor as to what circumstances might justify such taking as not being unlawful, nor as to how far an honest though mistaken belief that such circumstances as would justify the taking existed, might form an excuse, for, as the case is reserved, we must take it as proved, that the girl was in the possession of her father, and that he

took her, knowing that he trespassed on the father's rights, and had no color of excuse for so doing.

The question, therefore, is reduced to this, whether the words in 24 and 25 Vict., ch. 100, sec. 55, that whosoever shall take "any unmarried girl, being under the age of sixteen, out of the possession of her father," are to be read as if they were, "being under the age of sixteen, and he knowing that she was under that age." No such words are contained in the statute, nor is there the word "maliciously," "knowingly," or any other word used that can be said to involve a similar meaning.

The argument in favor of the prisoner must therefore entirely proceed on the ground that, in general, a guilty mind is an essential ingredient in a crime, and that where a statute creates a crime, the intention of the legislature should be presumed to be to include "knowingly" in the definition of the crime, and the statute should be read as if that word were inserted, unless the contrary intention appears. We need not inquire at present whether the canon of construction goes quite so far as above stated, for we are of opinion that the intention of the legislature sufficiently appears to have been to punish the abduction, unless the girl, in fact, was of such an age as to make her consent an excuse, irrespective of whether he knew her to be too young to give an effectual consent, and to fix that age at sixteen. The section in question is one of a series of enactments, beginning with sec. 48 and ending with sec. 55, forming a code for the protection of women and the guardians of young women. These enactments are taken, with scarcely any alteration, from the repealed statute, 9 Geo. IV, ch. 31, which had collected them into a code from a variety of old statutes, all repealed by it.

Sec. 50 enacts, that whosoever shall "unlawfully and carnally know and abuse any girl under the age of ten years" shall be guilty of felony. Sec. 51, whoever shall "unlawfully and carnally know and abuse any girl being above the age of ten years and under the age of twelve years" shall be guilty of a misdemeanor.

It seems impossible to suppose that the intention of the legislature in those two sections could have been to make the crime depend upon the knowledge of the prisoner of the girl's actual age. It would produce the monstrous result that a man who had carnal connection with a girl, in reality not quite ten years

old, but whom he on reasonable grounds believed to be a little more than ten, was to escape altogether. He could not, in that view of the statute, be convicted of the felony, for he did not know her to be under ten. He could not be convicted of the misdemeanor, because she was in fact not above the age of ten. It seems to us that the intention of the legislature was to punish those who had connection with young girls, though with their consent, unless the girl was in fact old enough to give a valid consent. The man who has connection with a child, relying on her consent, does it at his peril, if she is below the statutable age.

The 55th section, on which the present case arises, uses precisely the same words as those in sections 50 and 51, and must be construed in the same way, and, if we refer to the repealed statute 4 and 5 Phil. and Mary, ch. 8, from the 3d section of which the words in the section in question are taken, with very little alteration, it strengthens the inference that such was the intention of the legislature.

The preamble states, as the mischief aimed at, that female children, heiresses, and others having expectations, were, un-awares of their friends, brought to contract marriages of disparagement, "to the great heaviness of their friends," and then to remedy this, enacts by the 1st section, that it shall not be lawful for anyone to take an unmarried girl, being under sixteen, out of the custody of the father, or the person to whom he, either by will or by act in his lifetime, gives the custody, unless it be *bona fide* done by or for the master or mistress of such child, or the guardian in chivalry, or in socage of such child. This recognizes a legal right to the possession of the child, depending on the real age of the child, and not what appears. And the object of the legislature being, as it appears by the preamble it was, to protect this legal right to the possession, would be baffled, if it was an excuse that the person guilty of the taking thought the child above sixteen. The words "unlawfully take," as used in the 3d section of 4 and 5 Phil. and Mary, ch. 8, means without the authority of the master or mistress, or guardian, mentioned in the immediately preceding section.

There is not much authority on the subject, but it is all in favor of this view. In *Reg. v. Robins*, 1 O. & K., 456, Atcherly, Sergt., then acting as judge of assizes, so ruled, apparently (though the report leaves it a little ambiguous), with the ap-

proval of Tindal, C. J. In *Reg. v. Olifier*, 10 Cox Cr. C., 402, Bramwell, B., so ruled at the Old Bailey, apparently arriving at the conclusion independently of *Reg. v. Robins*, 1 C. & K., 456. In *Reg. v. Mycock*, 12 Cox Cr. C., 28, Willes, J., without having the case of *Reg. v. Olifier*, 10 Cox Cr. C., 402, brought to his notice, acted on the case of *Reg. v. Robins*, 1 C. & K., 456, saying that a person who took a young woman from the custody of her father must take the consequences if she proved under age. And Quain, J., followed this decision in *Reg. v. Booth*, 12 Cox Cr. C., 231.

We think those rulings were right, and, consequently, that the conviction in the present case should stand.

The following judgment (in which Kelly, C. B., Cleasby, Pollock, and Amphlett, BB., and Grove, Quain and Denman, JJ., concurred) was delivered by

BRAMWELL, B. The question in this case depends on the construction of the statute under which the prisoner is indicted. That enacts that "whoever shall unlawfully take any unmarried girl under the age of sixteen out of the possession and against the will of her father, or mother, or any other person having the lawful care or charge of her, shall be guilty of a misdemeanor." Now the word "unlawfully" means "not lawfully," "otherwise than lawfully," "without lawful cause," such as would exist, for instance, on a taking by a police officer on a charge of felony or a taking by a father of his child from his school. The statute therefore, may be read thus: "Whoever shall take, etc., without lawful cause." Now the prisoner had no such cause, and, consequently, except in so far as it helps the construction of the statute, the word "unlawfully" may in the present case be left out, and then the question is, has the prisoner taken an unmarried girl under the age of sixteen, out of the possession of and against the will of her father? In fact, he has; but it is said, not within the meaning of the statute, and that that must be read as though the word "knowingly," or some equivalent word was in, and the reason given is, that as a rule the *mens rea* is necessary to make any act a crime or offense, and that if the facts necessary to constitute an offense are not known to the alleged offender, there can be no *mens rea*. I have used the word "knowingly," but it will, perhaps, be said that here the prisoner not

only did not do the act knowingly, but knew, as he would have said, or believed, that the fact was otherwise than such as would have made his act a crime; that here the prisoner did not say to himself, "I do not know how the fact is, whether she is under sixteen or not, and will take the chance," but acted on the reasonable belief that she was over sixteen, and that though if he had done what he did, knowing or believing neither way, but hazarding it, there would be a *mens rea*; there is not one when as he believes, he knows that she is over sixteen.

It is impossible to suppose that, to bring the case within the statute, a person taking a girl out of her father's possession against his will is guilty of no offense unless he, the taker, knows she is under sixteen; that he would not be guilty if the jury were of opinion he knew neither one way nor the other. Let it be, then, that the question is, whether he is guilty where he knows, as he thinks, that she is over sixteen. This introduces the necessity for reading the statute with some strange words introduced; as thus: "Whosoever shall take any unmarried girl, being under the age of sixteen, and not believing her to be over the age of sixteen, out of the possession," etc. Those words are not there, and the question is, whether we are bound to construe the statute as though they were, on account of the rule that the *mens rea* is necessary to make an act a crime. I am of opinion that we are not, nor as though the word "knowingly" was there, and for the following reasons: The act forbidden is wrong in itself if without lawful cause; I do not say illegal, but wrong. I have not lost sight of this, that though the statute probably principally aims at seduction for carnal purposes, the taking may be by a female with a good motive. Nevertheless, though there may be such cases which are not immoral in one sense, I say that the act forbidden is wrong.

Let us remember what is the case supposed by the statute. It supposes that there is a *girl* — it does not say a woman, but a girl — something between a child and a woman; it supposes she is in the *possession* of her father or mother, or other person having lawful *care or charge* of her; and it supposes there is a *taking*, and that that taking is *against the will* of the person in whose possession she is. It is, then, a *taking* of a *girl*, in the *possession* of some one, *against his will*. I say that done without lawful cause is wrong, and that the legislature meant it

should be at the risk of the taker whether or no she was under sixteen. I do not say that taking a woman of fifty from her brother's, or even father's house, is wrong. She is at an age when she has a right to choose for herself; she is not a *girl*, nor of such tender age that she can be said to be in the *possession* of or under the *care or charge* of any one. I am asked where I draw the line; I answer, at when the female is no longer a girl in any one's possession.

But what the statute contemplates, and what I say is wrong, is the taking of a female of such tender years that she is properly called a *girl*, can be said to be in another's *possession* and in that other's *care or charge*. No argument is necessary to prove this; it is enough to state the case. The legislature has enacted that if any one does this wrong act, he does it at the risk of her turning out to be under sixteen. This opinion gives full scope to the doctrine of the *mens rea*. If the taker believed he had the father's consent, though wrongly, he would have no *mens rea*; so if he did not know she was in anyone's possession, nor in the care or charge of anyone. In those cases he would not know he was doing the act forbidden by the statute, an act which, if he knew she was in possession and in care or charge of anyone, he would know was a crime or not, according as she was under sixteen or not. He would not know he was doing an act wrong in itself, whatever was his intention, if done without lawful cause.

In addition to these considerations, one may add that the statute does use the word "unlawfully," and does not use the words "knowingly" or "not believing to the contrary." If the question was, whether his act was unlawful, there would be no difficulty, as it clearly was not lawful.

This view of the section, to my mind, is much strengthened by a reference to other sections of the same statute. Sec. 50 makes it a felony to unlawfully and carnally know a girl under the age of ten. Sec. 51 enacts, when she is above ten and under twelve to unlawfully and carnally know her is a misdemeanor. Can it be supposed that in a former case a person indicted might claim to be acquitted on the ground that he had believed the girl was over ten though under twelve, and so that he had only committed a misdemeanor; or that he believed her over twelve, and so had committed no offense at all; or that in a case under

sec. 51 he could claim to be acquitted because he believed her over twelve. In both cases the act is intrinsically wrong; for the statute says if "unlawfully" done, the act done with a *mens rea* is unlawfully and carnally knowing the girl, and the man doing that act does it at the risk of the child being under the statutory age. It would be mischievous to hold otherwise. So sec. 56, by which, whoever shall take away any child under fourteen with intent to deprive parent or guardian of the possession of the child, or with intent to steal any article upon such child, shall be guilty of felony. Could a prisoner say, "I did take away the child to steal its clothes, but I believed it to be over fourteen?" If not, then neither could he say, "I did take the child with intent to deprive the parent of its possession, but I believed it over fourteen." Because if words to that effect cannot be introduced into the statute where the intent is to steal the clothes, neither can they where the intent is to take the child out of the possession of the parent. But if those words cannot be introduced in sec. 56, why can they be in sec. 55?

The same principles apply in other cases. A man was held liable for assaulting a police officer in the execution of his duty, though he did not know he was a police officer (10 Cox Cr. C., 362). Why? Because the act was wrong in itself. So, also, in the case of burglary, could a person charged claim an acquittal on the ground that he believed it was past six when he entered; or in housebreaking, that he did not know the place broken into was a house? Take, also, the case of libel, published when the publisher thought the occasion privileged; or that he had a defense under Lord Campbell's act, but was wrong; he could not be entitled to be acquitted because there was no *mens rea*. Why? Because the act of publishing written defamation is wrong where there is no lawful cause.

As to the case of the marine stores, it was held properly that there was no *mens rea*, where the person charged with the possession of naval stores, with the admiralty mark, did not know the stores he had bore the mark; *Reg. v. Sleep*, 8 Cox Cr. C., 472, because there is nothing *prima facie* wrong or immoral in having naval stores unless they are so marked. But suppose his servant had told him that there was a mark, and he had said he would chance whether or not it was the admiralty mark? So in the case of the carrier with game in his possession; unless he

knew he had it, there would be nothing done or permitted by him, no intentional act or omission. So of the vitriol senders; there was nothing wrong in sending such packages as were sent unless they contained vitriol.

Further, there have been four decisions on this statute, in favor of the construction I contend for. I say it is a question of construction of this particular statute in doubt, bringing thereto the common law doctrine of *mens rea* being a necessary ingredient of crime. It seems to me impossible to say that where a person takes a girl out of her father's possession, not knowing whether she is or is not under sixteen, that he is not guilty; and equally impossible when he believes, but erroneously, that she is old enough, for him to do a wrong act with safety. I think the conviction should be affirmed.

DENMAN, J. I agree in the judgment of my brothers Bromwell and Blackburn, and I wish what I add to be understood as supplementary to them. The defendant was indicted under the 24th and 25th Vict., ch. 100, sec. 55, which enacts that "whosoever shall *unlawfully* take, or cause to be taken, any unmarried girl, being under the age of sixteen years, out of the possession and against the wish of her father or mother, or of any other person *having the lawful care or charge of her*, shall be guilty of a misdemeanor."

I cannot hold that the word "unlawfully" is an immaterial word in an indictment framed upon this clause. I think that it must be taken to have a meaning, and an important meaning, and to be capable of being either supported or negatived by evidence upon the trial. See *Reg. v. Turner*, 2 Moo. Cr. C., 41; *Reg. v. Ryan*, 2 Hawk. P. C., ch. 25, § 96.

In the present case the jury found that the defendant had done everything required to bring himself within the clause as a misdemeanor, unless the fact that he *bona fide* and reasonably believed the girl taken by him to be eighteen years old constituted a defense. That is, in other words, unless such *bona fide* and reasonable belief prevented them from saying that the defendant, in what he did, acted "unlawfully," within the meaning of the clause. The question, therefore, is, whether, upon this finding of the jury, the defendant did unlawfully do the things which they found him to have done.

The solution of this question depends upon the meaning of the word "unlawfully," in sec. 55. If it means "with a knowledge and belief that every single thing mentioned in the section existed at the moment of the taking," undoubtedly the defendant would be entitled to an acquittal, because he did not believe that a girl of under sixteen was being taken by him at all. If it only means "without lawful excuse" or justification, then a further question arises, viz.: whether the defendant had any lawful excuse or justification for doing all the acts mentioned in the clause as constituting the offense, by reason, merely, that he *bona fide* and reasonably believed the girl to be older than the age limited by the clause. Bearing in mind the previous enactments relating to abduction of girls under sixteen, 4 and 5 Phil. & Mary, ch. 8, sec. 2, and the general course of the decisions upon these enactments, and upon the present statute, and looking at the mischief intended to be guarded against, it appears to me reasonably clear that the word "unlawfully," in the true sense in which it was used, is fully satisfied, by holding that it is equivalent to the word "without lawful excuse," using those words as equivalent to "without such an excuse as, being proved, would be a complete legal justification for the act, even when all the facts constituting the offense exist."

Cases may easily be suggested where such a defense might be made out, as, for instance, if it were proved that he had the authority of a court of competent jurisdiction, or of some legal warrant, or that he acted to prevent some illegal violence not justified by the relation of parent and child, or school mistress, or other custodian, and requiring forcible interference by way of protection.

In the present case the jury found that the defendant believed the girl to be eighteen years of age; even if she had been of that age, she would have been in the lawful care and charge of her father as her guardian by nature. See Co. Litt. 88, b. n. 12, 19th ed., recognized in *Reg. v. Howes*, 3 E. & E., 332. Her father had a right to her personal custody up to the age of twenty-one, and to appoint a guardian by deed or will, whose right to her personal custody would have extended up to the same age. The belief that she was eighteen would be no justification to the defendant for taking her out of his possession, and against his will. By taking her, even with her own consent, he must at

least have been guilty of aiding and abetting her in doing an unlawful act, viz.: in escaping, against the will of her natural guardian, from his lawful care and charge. This, in my opinion, leaves him wholly without lawful excuse or justification for the act he did, even though he believed that the girl was eighteen, and therefore unable to allege that what he has done was not unlawfully done within the meaning of the clause. In other words, having knowingly done a wrongful act, viz.: in taking the girl away from the lawful possession of her father, against his will, and in violation of his rights as guardian by nature, he cannot be heard to say that he thought the girl was of age beyond that limited by the statutes for the offense charged against him. He had wrongfully done the very thing contemplated by the legislature; he had wrongfully and knowingly violated the father's right, against the father's will, and he cannot set up a legal defense by merely proving that he thought he was committing a different kind of wrong from that which in fact he was committing.

Conviction affirmed.

OSBOEN vs. THE STATE.

(52 Ind., 526.)

ABDUCTION FOR PROSTITUTION: *Prostitution — Illicit intercourse.*

The indictment charged the abduction of "a female, etc., for the purpose of having illicit sexual intercourse with her." The statute is against abduction "for the purpose of prostitution." *Held*, that the indictment charged no offense under the statute, and should have been quashed. Prostitution means common, indiscriminate, illicit intercourse, and not illicit intercourse with one man only.

WORDEN, J. The appellant was tried, convicted, and sent to the state prison upon the following indictment, its sufficiency having been properly questioned, viz.:

"The grand jurors," etc., "in the name and by the authority of the state of Indiana, upon their oaths present and charge that on or about the 15th day of January, A. D. 1875, at and in the county of Franklin, and state of Indiana, one James T. Osborn unlawfully and feloniously enticed away one Alvaretus Faurote,

a female of previously chaste character, from said county of Franklin, in the state of Indiana, to the city of Jeffersonville, in the county of Clarke, in said state of Indiana, for the purpose of having illicit sexual intercourse with her, the said Alvaretus Faurote, contrary to the form of the statute," etc.

The indictment is based upon the following statutory provision, viz.:

"If any person shall entice or take away any female of previously chaste character, from wherever she may be, to a house of ill fame, or elsewhere, for the purpose of prostitution, and every person who shall advise or assist in such abduction, shall be imprisoned in the state prison not less than two nor more than five years, or may be imprisoned in the county jail, not exceeding one year, and be fined not exceeding five hundred dollars; but in such case the testimony of such female shall not be sufficient, unless supported by other evidence, corroborating to the same extent as is required in cases of perjury, as to the principal witness." 2 G. & H., 441, sec. 16.

It will be seen by the indictment that the appellant is charged with having abducted the female "for the purpose of having illicit sexual intercourse with her;" and not "for the purpose of prostitution," as is provided for by the statute. The question arises, whether the facts charged come within the statute. We are of opinion, upon an examination of the authorities, that they do not.

The first case to which our attention has been called is that of *Commonwealth v. Cook*, 12 Met., 93. There Cook was indicted under a statute quite similar to our own. The court say, in speaking of the point here involved (p. 98): "The court are of opinion, that the offense made punishable by this statute is something beyond that of merely procuring a female to leave her father's house for the sole purpose of illicit sexual intercourse with the individual thus soliciting her to accompany him; that she must be enticed away with the view, and for the purpose, of placing her in a house of ill fame, place of assignation, or elsewhere, to become a prostitute, in the more full and exact sense of that term; that she must be placed there for common and indiscriminate sexual intercourse with men; or at least, that she must be enticed away for the purpose of sexual intercourse by others than the party who thus entices her; and that a mere en-

ting away of a female for a personal sexual intercourse will not subject the offender to the penalties of this statute."

The next case is that of *Carpenter v. The People*, 8 Barb., 603. In that case, Carpenter was prosecuted under a similar statute, and the court came to the same conclusion as that arrived at in Massachusetts, though the Massachusetts case is not therein mentioned. The court say (p. 611): "We are entirely clear that by the expression in question" (prostitution), "as used in the statute, it was intended that in order to constitute the offense thereby created, the abduction of the female must be for the purpose of her indiscriminate, meretricious commerce with men. That such must be the case to make her a prostitute, or her conduct prostitution, within the act."

Following these cases is that of the *State v. Ruhl*, 8 Iowa, 447. The latter was also a prosecution under a similar statute, for enticing away a female for the purpose of prostitution. There was evidence of a purpose on the part of the defendant "to seduce and enjoy the body of the said Matilda" (the female), "and that he had taken her away, in order to have carnal intercourse with her, and did so enjoy her person; but there was no testimony that he purposed that she should be carnally enjoyed by others, nor that she should be devoted to promiscuous carnal intercourse, nor that he took her, or proposed taking her, to any house of prostitution." On these facts the defendant asked the following instruction, which was refused, viz.:

"If the defendant only intended to obtain the body of the said Matilda, for his own personal carnal enjoyment, and no more, then the act did not amount to her prostitution, in the sense of the law."

It was held that the charge should have been given, that the word "prostitution" means common, indiscriminate, illicit intercourse, and not sexual intercourse confined exclusively to one man. To the same effect is the still later case of *State v. Stoyell*, 54 Me., 24.

In view of these authorities, we think it clear that the indictment does not charge the abduction of the female "for the purpose of prostitution," within the meaning of the statute. The judgment below is reversed, and the cause remanded, with instructions to the court below to sustain the motion to quash the indictment.

The clerk will give the proper notice for the return of the prisoner.

LYONS vs. STATE.

(52 Ind., 426.)

ABDUCTION FOR PROSTITUTION: *Chaste character—Evidence.*

A statute against the abduction of females of "previous chaste character" means, of actual personal virtue in distinction from a good reputation.

On the trial of an indictment founded on that statute, it is admissible to prove previous particular acts of illicit intercourse on the part of the female abducted.

DOWNEY, C. J. This was a prosecution for abduction, under sec. 16, p. 441, 2 G. & H. The defendant was convicted and sentenced to the state's prison. The refusal of the court to quash the indictment, and the overruling of the defendant's motion for a new trial, are assigned as errors. We see no valid objection to the indictment. There is a little surplusage in its allegations, but it is good, notwithstanding.

On the trial, the defendant proposed to prove acts of illicit sexual intercourse on the part of the prosecuting witness prior to the alleged abduction, but the court rejected the evidence. We think this was an error. In such a case the female must be of "previous chaste character." This has been held to mean that she shall possess actual personal virtue in distinction from a good reputation. A single act of illicit connection may, therefore, be shown on behalf of the defendant. Bish. Stat. Crimes, sec. 639; *Carpenter v. The People*, 8 Barb., 603; *Kenyon v. The People*, 26 N. Y., 203; *The State v. Shean*, 32 Iowa, 88; *Andre v. The State*, 5 id., 389; *Boak v. The State*, id., 430.

The preceding section relating to seduction is different. It only requires that the female shall be "of good repute for chastity."

The authorities cited by the state do not bear on the exact question under consideration.

The judgment is reversed, and the cause remanded for a new trial. The clerk will certify to the warden of the state prison as required by law.

SLATTERY vs. PEOPLE.

(76 Ill., 217.)

ABORTION: *Statute construed — Intent — Admissions — Evidence.*

The respondent was convicted on an indictment charging him with feloniously beating and striking a pregnant woman with intent to cause her to miscarry. The statute under which the indictment was found is as follows: "Whoever, by means of any instrument, medicine, drug, or other means whatever, causes any woman pregnant with child to abort or miscarry," etc.: *Held*, that the statute only applies to those who intend to produce an abortion.

Silence under accusations is not always to be considered as an admission of their truth.

Where the respondent had promised to be on his good behavior at a family interview, to which he had induced a friend, by means of such promise, to go with him, it was *held* that his silence at that interview under harsh accusations should not be construed as an admission of their truth.

The evidence in this case *held* insufficient to justify a conviction.

BREESE, J. Plaintiff in error was indicted, at the June term, 1874, of the Hancock circuit court, for feloniously, unlawfully and maliciously beating, striking, kicking, pinching and crushing one Celestia Slattery, a pregnant woman, with intent, unlawfully, feloniously and maliciously to cause her to miscarry, and by means whereof she did miscarry.

The jury found the defendant guilty, and fixed his imprisonment in the penitentiary at three years. A motion for a new trial was denied, and judgment rendered on the verdict. The record is brought here by writ of error, and various errors assigned. Those which are deemed important will be noticed.

The section of the statute under which the indictment was found is as follows: "Whoever, by means of any instrument, medicine, drug, or other means whatever, causes any woman pregnant with child to abort or miscarry, or attempts to procure an abortion or miscarriage, etc., shall be imprisoned in the penitentiary not less than one year nor more than two years." Rev. Stat., 1874, p. 352.

This statute is evidently aimed at professional abortionists, and at those who, with the intent and design of producing abortion, shall use any means to that end, no matter what those means may be, but not at those who, with no such purpose in view, should, by a violent act, unfortunately produce such a re-

sult. The intent to produce an abortion must exist when the means are used. That is the charge in the indictment. It is there charged that the prisoner did feloniously and maliciously beat this pregnant woman with intent, unlawfully, feloniously, etc., to cause her to miscarry.

The party alleged to have been so treated is the wife of the prisoner, who, by his own confession, had not treated her in the kindest manner, but there is not a particle of proof in the record going to show that her miscarriage was caused by any violence he at any time used toward her, or that he had the least idea such would be the result, or that he desired or intended such a result.

A felonious and malicious intent to cause a miscarriage being charged in the indictment, circumstances sufficient to satisfy the jury of the intent should be shown.

A criminal offense consists in a violation of a public law, in the commission of which there must be a union or joint operation of act and intention, or criminal negligence, and the intention is manifested by the circumstances connected with the perpetration of the offense, and the sound mind and discretion of the person accused.

The only marks upon the person of Mrs. Slattery were a discoloration about a finger's length of one thigh, a mark on one of her arms, and a slight discoloration at one spot on her face, but how these were produced no witness testified. It was in proof she was about three months gone in pregnancy, had had three or four miscarriages previously, and but a short time before this last one, she had ridden some miles in a lumber wagon, to a dancing party, where she danced all night and into the morning, and rode home in the same conveyance.

One Taylor, claiming to be a doctor, gave it as his opinion that these marks appeared to have been made three or four days previous to the miscarriage, and in his opinion, produced it; whilst Drs. Thompson and Carlton testify, the bruises, as described by Taylor, would not cause miscarriage to a healthy woman. They further testify, after three or four miscarriages, it becomes habitual, and the chances are against the woman carrying the child the full time; and they further say that, with such a woman, lifting heavy weights, any hard work, fast walking, riding in a lumber wagon, dancing, or anything of that kind, would be liable to induce miscarriage.

There is no question that the great preponderance of the evidence sustains the position taken by the prisoner's counsel, that miscarriage had become habitual with her, and the chances were all against her carrying this fetus the full time.

We have said there was no evidence to show this miscarriage of the prisoner's wife was caused by any act of violence of his toward her. The weight of the testimony is the other way.

is argued by the counsel for the people, it sufficiently appears from the testimony of her father, Joseph Larrimore.

Neither he nor Mrs. Larrimore, the mother, testify to any act of violence of their own knowledge, but claim that at Larrimore's house, where Mrs. Slattery then was, after her miscarriage, at an interview there held by the prisoner, at which was present his wife, her father and mother, a Mr. Bliss and a Mrs. Davis, the prisoner admitted many acts of violence which Larrimore specified, by not denying the accusations. No time was specified when these acts were done—whether years before or quite recently; and the prisoner was not in a position to deny, for he had promised Bliss, if he would go with him and be present at the interview, he would keep his temper—would be on his good behavior. He felt pledged to make no denial of any statement Larrimore should make, but to keep his temper under strict control, and let his father-in-law say what he pleased. At this interview not one word was said by Mr. or Mrs. Larrimore, or by Mrs. Slattery, or by anybody else, that her miscarriage had been caused by the prisoner's violence to her. It is strange, indeed, if such was the fact, the miscarriage so recent, and all the prisoner's enormities narrated with much apparent *gusto* by Larrimore, that he should not have charged this miscarriage as having been produced by the prisoner's violence. There is nothing of it in the proof.

We fail to find in this record anything connecting the prisoner with the crime charged, as it is defined in the statute book.

The judgment will be reversed, and the cause remanded, that a new trial may be had.

Judgment reversed.

NOTE.—The following are a few of the most important American cases which deal with the subject of silence as an implied admission:

Two watchmen took K. into custody and carried him to a watchhouse; and one of them there said that K. had been robbing a man; R. soon came in and

pointed to K. and said: "That man has stolen my money." While one of the watchmen was proceeding to lock up K., B. saw K. put something on the shelf in the watchhouse, and B. thereupon took from the shelf a bag of money, and R. said it was his bag, and that it was all the money he had; K. was within hearing of all that was said after he was carried to the watchhouse, and made no reply to any part of it: *Held*, that in the trial of an indictment against K. for stealing R.'s bag and money from his person, the declarations of the watchman and of R., to which K. made no reply, were not competent evidence of K.'s admission either of the fact of stealing, or that the bag and money were the property of R.

The opinion of the court was delivered by SHAW, C. J., who used this language

"The circumstances were such that the court are of opinion that the declaration of the party robbed, to which the defendant made no reply, ought not to have been received as competent evidence of his admission, either of the fact of stealing, or that the bag and money were the property of the party alleged to be robbed. The declaration made by the officer, who first brought the defendant to the watchhouse, he had certainly no occasion to reply to. The subsequent statement, if made in the hearing of the defendant (of which we think there was evidence), was made while he was under arrest, and in the custody of persons having official authority. They were made by an excited complaining party to such officers, who were just putting him into confinement. If not strictly an official complaint to officers of the law, it was a proceeding very similar to it, and he might well suppose that he had no right to say anything until regularly called upon to answer. We are therefore of opinion that the verdict must be set aside and a new trial granted. *Commonwealth v Kenney*, 12 Met. (Mass.), 235.

Upon the trial of an indictment for grand larceny, evidence was received, on the part of the prosecution, under objection, that after the arrest of the prisoners the prosecutor went to their place of custody to identify them; that he did identify them, and charged them with participation in the offense, stating to the officers the part each took, and describing the money stolen, to which the prisoners made no reply. Upon one of the prisoners was found two parcels of money, one answering the description given by the prosecutor; the prisoners requested that the two parcels should be kept separate, as the other was "bar money:" *Held*, that the evidence was competent, as an implied acquiescence on the part of the accused in the truth of the prosecutor's statements.

In delivering the opinion of the court, ALLEN, J., makes this reference to the case above cited:

"The case of *The Commonwealth v. Kenney* (12 Met., 235) was peculiar in its circumstances, and the opinion by the learned chief justice, speaking for the court, would seem not to be in harmony with the current of authority in this country or in England, or with the elementary writers. It is distinguishable from this case, in this, that there was no direct evidence of the body of the offense, nor any evidence of the main fact, except as implied by the omission of the prisoners to deny the statement of the individuals claiming to have been robbed, of the fact of the robbery, and a description of the money lost. To make the evidence admissible as an implied admission of the fact stated, it had to be assumed that the accused had personal knowledge of the facts stated; for he was only called upon to deny and could only deny statements of the truth or falsity of which he had personal knowledge. Here the *corpus delicti* was proved by other evidence, and neither the declarations of the prosecution nor the admission of the prison-

ers, either express or implied, were relied upon for that purpose." *Kelley v. People*, 55 N. Y., 565.

[The reasoning of the learned judge in this case, in attempting to distinguish it from *Commonwealth v. Kenney*, is fallacious, because in every case, the testimony to show an implied admission is admitted for the very purpose of showing that the accused has personal knowledge of the facts stated, and was an actor in the transaction. — REP.]

When a matter is stated in the hearing of one, which injuriously affects his rights, and he understands it and is silent, his silence may be taken as a tacit admission of the fact stated. But it is otherwise if it appears that the statement is made in the course of a judicial inquiry, or where circumstances existed which rendered a reply inexpedient or improper, or that fear, doubts of his rights or a belief that his security would be better promoted by silence than by a response, governed him at the time. *Donnelly v. State*, 2 Dutch. (N. J.), 601.

On the trial of an indictment for being a common seller of spirituous liquors, a witness testified that he saw six barrels being moved into the defendant's cellar, and that the teamster told him, in the defendant's presence, that they were barrels of gin; and the jury were instructed that the remark of the teamster could not be regarded by them, unless satisfied that the defendant heard it: *Held*, that this instruction might have been understood by the jury as implying that the defendant's silence was, at all events, and without reference to the accompanying circumstances, an acquiescence in the truth of what was said; and that the defendant was therefore entitled to a new trial. The court say: "An acquiescence, to have the effect of an admission, must exhibit some act of the mind, some purpose designed, some object intended. Before acquiescence in the language or conduct of others can be assumed as a concession of the truth of any particular statement, or of the existence of any particular fact, it must plainly appear that the language was heard, and the conduct understood. Nor is that alone sufficient. It should also be made to appear that the party to whose silence a consequence so important and material is attributed had not only an opportunity to speak for himself, but was in a situation where it would have been fit, suitable, or proper for him, or he would have been likely, according to common experience, to have done so. *Commonwealth v. Harvey*, 1 Gray (Mass.), 487.

In *Mattocks v. Lyman*, 16 Vt., 113, the plaintiff declared in assumpsit, on a special contract, by the terms of which he was to purchase wool which the defendants were to sell, and the profits were to be divided. The plaintiff, to prove the allegations in his declaration, introduced one Bradley as a witness, who testified that, at the request of the plaintiff, he called with him at the defendant's store, and that the plaintiff stated to the defendant Lyman, the terms of the contract, as set forth in the declaration, and said he was informed that the wool had been sold for a price which would entitle him to one-half of the profits, and demanded said proportion, and that Lyman's only reply was, that he was ready to settle with him, plaintiff; but that they did not owe him anything, but that he, plaintiff, owed them. On cross-examination, the witness said he did not recollect certainly that anything was said about the defendant's furnishing money for the plaintiff to purchase wool with. The jury were told that the testimony of Bradley was competent evidence, as tending to prove, by an implied admission on the part of the defendant Lyman, that the contract was as claimed by the plaintiff; but that its weight must depend upon the circumstances attending it, of which they were judges.

The opinion of the court was delivered by Redfield, J., who uses this language:

"The most important practical question by far, discussed in the case, remains to be determined. It seems to have been generally considered that all conversation had in the presence of a party, in regard to the subject of litigation, might properly be given in evidence to the jury. But in *Vail v. Strong*, 10 Vt., 457, and in *Gaile v. Lincoln*, 11 id., 152, some qualification of this rule is established. It is there held, that unless a claim is asserted by the claimant or his agent, and distinctly made to the party, and calling naturally for a reply, mere silence is no ground of inference against one. And we think even in such a case, that mere silence ought not to conclude a party, unless he thereby induces a party to act upon his silence in a manner different from what he otherwise would have acted. There are many cases of this character when one's silence ought to conclude him. But when the claim is made for the mere purpose of drawing out evidence, as, in the present case, it is obvious must have been the fact, or when it is in the way of altercation, or, in short, unless the party asserting the claim does it with a view to ascertain the claim of the person upon whom he makes the demand, and in order to know how to regulate his own conduct in the matter, and this is known to the opposite party, and he remains silent, and thereby leads the adversary astray, mere silence is, and ought to be, no ground of inference against any one. The liabilities to misapprehension, or misrecollection, or misrepresentation, are such, that this silence might be the only security. To say, under such a dilemma, that silence shall imply assent to all which an antagonist may see fit to assert, would involve an absurdity little less gross than some of the most extravagant caricatures of this caricature-loving age. With some men, perhaps, silence would be some ground of inferring assent, and with others none at all. The testimony, then, would depend upon the character and habits of the party, which would lead to the direct trial of the parties, instead of the case."

STATE vs. CLARK.

(54 N. H., 456.)

ADULTERY: *Proof of marriage in criminal cases — Indictment — Comparison of handwriting.*

Under an indictment charging the respondent, a married man, with adulterous and lascivious cohabitation with a single woman, the prosecution offered evidence tending to prove the marriage of the respondent in 1866. To avoid this marriage, the respondent testified in his own behalf that he had been married in 1864, to a woman who was still living, and from whom he had never been divorced: *Held*, that it was sufficient to maintain the allegation of the indictment, if the jury found either of these marriages to be a legal, subsisting marriage at the time of the cohabitation, and that the evidence as to both was properly submitted to the jury.

Evidence of a marriage in fact in a foreign jurisdiction is *prima facie* evidence of a valid marriage, and it is not necessary to prove the foreign law.

Where, in the trial, the respondent admitted the genuineness of a certain letter, it was held that the jury might use it to compare with the handwriting of

letters whose genuineness was disputed by the respondent, but to whose genuineness a witness testified.

Where an indictment charging the respondent, a married man, with adulterous and lascivious cohabitation with J., does not allege in express terms that J. is not his wife, but does allege that J. is a single woman, it sufficiently appears on a motion in arrest of judgment, that J. is not respondent's wife, and judgment will not be arrested.

INDICTMENT, charging that the respondent, on the first day of April, A. D. 1871, at Keene, in the county of Cheshire aforesaid, with force and arms, and from said day until the day of the finding of this indictment, did and ever since has continued to and still does lewdly and lasciviously associate and cohabit with one Charlotte M. Johnson, of said Keene, a single woman; he, the said Thaddeus B. Clark, during all the time aforesaid being a married man and having a lawful wife alive, who had not during any of said time been absent, and not heard of or from for the space of three years together, nor reported and generally believed to be dead, and from whom the said Thaddeus B. Clark has never been legally divorced, and his marriage with whom prior to all the time aforesaid did not take place within the age of consent, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state. The respondent pleaded not guilty, and upon the trial, offered himself as a witness, and testified. Upon his cross-examination, two letters were exhibited to him purporting to have been written by him to the Hudson woman hereinafter mentioned, but he denied that they were written by him. A letter was then exhibited to him purporting to have been written by him to a third person, which he admitted was genuine. The counsel for the state then proposed to read the Hudson letters to the jury, for them to consider if upon a comparison of those letters with the genuine one, they should be satisfied that they were all written by the same person. To this the respondent objected, but the court allowed the letters to be read, remarking to the jury, that they must not then draw any inference whatever from them, because it might be that they would not, upon a comparison of the three letters, be satisfied that the respondent wrote the two Hudson letters. To this the respondent excepted. Subsequently the Hudson woman testified that she received the two letters by mail, that she was well acquainted with the respondent's handwriting, and that those letters were in his handwriting.

The state offered as a witness Jennie M. Clark, who testified that on May 3, 1866, her name was Jennie M. Hudson; that she was then a widow; that on that day she was married to the respondent, at Binghamton, New York, by F. A. Durkee, a justice of the peace, and took from said Durkee a certificate of said marriage. A copy of this certificate was read in evidence without objection. Said Durkee was called by the respondent, and testified that he had been a counselor at law in Binghamton about twenty years; that he was a justice of the peace on said May 3, 1866, and for some time before and after, and in the habit of solemnizing marriages, and that he married the Hudson woman on that day to a man calling his name Clark, but that he was of the opinion that the respondent was not the man. The name inserted in the certificate was Thomas Clark. The respondent testified that he had sometimes gone by the name of Thomas Clark. The respondent testified, on cross-examination, that in the spring of 1864 he was married to Marietta Norton, in Elmira, New York, by James Dewitt, who was a justice of the peace; that he then had no living wife nor she any living husband; that that marriage was a legal marriage, he supposed. No objection was made, until after a verdict of guilty had been returned, to the validity of the Norton marriage, and none to the validity of the Hudson marriage, except that the man to whom the Hudson woman was married by Durkee was not the respondent.

The court instructed the jury that they were authorized to find that the Norton marriage was a legal one; also that they were authorized to find that the Hudson marriage was a legal one if the Norton woman had been lawfully divorced from the respondent previous to May 3, 1866. To these instructions the respondent excepted, upon the ground that there was no evidence that, by the laws of the state of New York at the time of those marriages, a justice of the peace was authorized to solemnize marriages in that state. The respondent did not require the state to prove that he cohabited with the Johnson woman as charged in the indictment, but admitted it. There was no evidence tending to show that the Norton woman had been divorced from the respondent, except what was derived from her own declarations. These declarations were introduced into the case as part of an affidavit of the respondent put in evidence by the state; also, as a part of sundry conversations which were proved. The court

instructed the jury that they might consider these declarations, and were authorized to find that such a divorce had been procured; also, that if the respondent was informed that the Norton woman had been divorced from him, and used reasonable diligence and did all they thought he reasonably ought to have done to ascertain the truth of the report, and, upon the information he obtained, honestly believed that she had procured a lawful divorce, and that he had no living wife during the time he cohabited with the Johnson woman as charged in the indictment, then it would be their duty to bring in a verdict of not guilty.

The respondent moved for a new trial on account of said ruling and the instructions as to the validity of the marriages, and also moved in arrest of judgment on the ground that the indictment contains no averment that the living wife therein mentioned and the said Charlotte M. Johnson are not one and the same person. It distinctly appeared at the trial, and was not questioned, that the Norton woman, the Hudson woman and the Johnson woman are three different persons.

Wellington, solicitor, for the state.

Healey (with whom was *Faulkner*), for the defendant.

LADD, J. The first and most important question in the case is, whether there was evidence from which the jury might legally find the fact of a subsisting marriage between the defendant and some woman other than Charlotte M. Johnson at the time of the cohabitation with said Johnson charged in the indictment.

At the trial, the prosecution seems to have started out with the idea of relying on proof of a marriage in fact with Jennie M. Hudson, but on cross-examination of the defendant, the state's counsel drew from him the declaration that in the spring of 1864, he was married—legally married, as he supposed, to another woman, one Marietta Norton, by a justice of the peace in New York, and both Norton and Hudson being alive at the time of his cohabitation with Johnson, the defense take the ground that, no matter whether there was or was not evidence from which the jury could legally find the fact of marriage with Hudson, no matter with what due observance of all forms, civil or ecclesiastical, the rite was solemnized, it was no marriage, for the plain and sufficient reason that, being already at the same time once married to Norton, who was still in life, no form, no ceremony,

no religious vow, no civil contract could make Hudson his lawful wife, because two women cannot maintain that intimate relation with one man at the same time.

Thus far the defendant's legal position is certainly unassailable. But what next? It is plain that a marriage in fact with Norton is just as bad for the defendant's case, as a marriage with Hudson, and so his counsel say; and that is the argument of the brief, as I understand it; that the defendant's testimony as to his marriage with Norton is not evidence from which the jury could legally find the fact of such marriage; in a word, the contention is that a marriage with Norton was sufficiently proved to render nugatory the evidence of a marriage in fact with Hudson, introduced by the state, but not to lay the foundation for a conviction upon this indictment; that it was proved sufficiently to show that the defendant was guilty of bigamy in his marital relations with Hudson, but not sufficiently to show that he was guilty of the same crime with Johnson when he afterwards found it convenient to enlarge his connections by embracing her in his domestic establishment, which is obviously contending in the same breath that the fact of marriage with Norton was and was not proved by the defendant's testimony.

By our statute, "in actions for criminal conversation, and in indictments for adultery, bigamy, and the like, there must be proof of a marriage in fact." Gen. Stats., ch. 161, sec. 18.

Was there competent evidence from which the jury might find the fact of marriage here? First, how was it as to Hudson? She testified that on the third day of May, 1866, she was married to the defendant at Binghamton, N. Y., by F. A. Durkee, a justice of the peace, and a copy of the marriage certificate given her by Durkee was produced. Durkee testified that he was a justice of the peace at that time, and was in the habit of solemnizing marriages, and that on that day he married Mrs. Hudson to a man calling himself Clark, but was of opinion that the defendant was not the man. There is no dispute or discrepancy except as to the identity of the defendant, and that was clearly a matter for the jury.

This evidence shows a marriage ceremony duly performed by a person who was in fact a magistrate; and it is to be presumed that the magistrate acted within the scope of his legal power and authority, until evidence to the contrary appears. The case

comes fully within the doctrine of *State v. Kean*, 10 N. H., 347. Indeed, in that case it was not shown either that the person who solemnized the marriage was in fact an ordained minister, or that, by the law of Maine, an ordained minister or any minister was authorized to solemnize marriages, although it did appear that he had for a long time officiated as a minister, and had married other persons. One objection therefore, to the proof of marriage in *State v. Kean*, namely, that the official character of the person solemnizing it was not shown, does not exist here; while the other, that it did not appear that by the law of Maine a minister was authorized to solemnize marriage, which seems to be identical with that taken by the defendant here, was overruled, and the proof of marriage held to be sufficient. That case must therefore be regarded as decisive of the present so far as regards the proof of marriage to Hudson. See Bish. M. & D., secs. 494, 495, 496.

But then comes the testimony of the defendant as to his marriage with Norton in 1864, and, as already observed, if the fact was as stated by him in reference to that marriage, the marriage with Hudson was no marriage at all, assuming that the tie had not been dissolved by death or a divorce. But his counsel argue that his testimony is not sufficient proof of a marriage in fact with Norton. If that be granted, it follows that the marriage with Hudson was the earliest and in fact the only marriage proved, and the case of the state, so far as regards proof of marriage, was made out; but if, on the other hand, we are to take it that the testimony of the defendant himself showed the fact of a marriage with Norton, his predicament is not changed, the only effect of that testimony being to change the marriage which is made the basis of his conviction.

If we look now at the instructions to which exception was taken, their only fault seems to be that they were too favorable to the defendant. In the first place, we think there was no competent evidence whatever of a divorce between Norton and the defendant. Therefore, allowing that question to go to the jury with the instruction given as to the legal effect of a belief on the part of the defendant that such divorce had been procured, opened to him one independent ground of defense, to which he was not entitled upon the evidence. But the court instructed the jury that they were authorized to find that the Norton marriage was

a legal one. So far, we have no doubt, the ruling was correct. It stands substantially the same as the proof of the Hudson marriage, which has been already considered, except that it rested upon the testimony of one witness who was present at the ceremony; that is, the defendant himself, instead of two. It all depended upon whether the jury believed the testimony of the defendant. As to that marriage, the case is not to be distinguished from *State v. Kean*.

The jury were further instructed that they were authorized to find that the Hudson marriage was a legal one if the Norton woman had been lawfully divorced from the respondent previous to May 3, 1866. That the jury were authorized to find the fact of marriage with either Norton or Hudson, from the evidence reported, we have already seen. We also hold that there was no evidence of a divorce. Now, it is not possible to say but that the jury may have found a divorce, when there was no legal evidence to sustain such finding. What follows? Simply that the verdict may rest upon the fact of marriage with Hudson, when it should rest upon the fact of marriage with Norton, for if the jury found a divorce obtained by Norton, whether upon competent or incompetent evidence, they must of necessity have found the fact of marriage with Norton; and inasmuch as we hold that there was evidence upon which they could legally find such marriage, though not a divorce, the defendant's situation was not changed, and it seems to be matter of demonstration that he was not prejudiced. No matter which horn of the dilemma be taken, the fact of marriage was made out and was certainly found by the jury before they could find a divorce from the first wife and a marriage to the second. That is, if the narrowest and most restricted interpretation possible be put upon the instruction, and it be understood to mean that the jury could not find a marriage with Hudson unless they first found a divorce from Norton, it was too favorable to the defendant, because they might have disbelieved the defendant's testimony and found no marriage with Norton. It would follow that they could find no divorce, and then, that although there was abundant proof of marriage with Hudson, still they could not find the fact, because they could not first find the fact of a divorce procured by Norton prior to May 3, 1866, the date of the marriage with Hudson.

The jury were probably instructed that if there was no mar-

riage with Norton, there could be no divorce, and that in such case they would be at liberty to find a marriage with Hudson. But however that may have been, the only fault with the instructions clearly is, that they were too favorable to the defendant, and there can be no doubt but that the fact of marriage, as required by the statute, must have been and was found by the jury under instructions by which the defendant could not have been prejudiced. All it amounts to is, that the jury found the fact of both marriages when it was only necessary that they should find one.

The defendant excepted to the admission of two letters which the state claimed were written by him to Hudson. His own testimony and that of Hudson were directly in conflict. He swore he did not write the letters, and she swore they were in his handwriting, etc. It was competent for the jury to compare the letters with a writing of his admitted to be genuine, and the order in which the several steps were taken is of no consequence.

The remaining question is, as to the sufficiency of the indictment. This question arises upon a motion in arrest of judgment, on the ground that the indictment contains no averment that the living wife therein mentioned and the said Charlotte M. Johnson are not one and the same person. The indictment is evidently framed upon sec. 5 of ch. 256 of the Gen. Stats., which enacts that "if any person having a husband or wife alive shall marry or cohabit with any other person, such person so marrying or cohabiting shall be punished," etc.

The indictment charges that the defendant has and still does lewdly and lasciviously associate and cohabit with one Charlotte M. Johnson, single woman, he, the said Thaddeus B. Clark, during all the time aforesaid, being a married man, and having a lawful wife alive, etc. It is doubtless necessary that the indictment should set forth the offense in the language of the statute, or, at least, in terms equivalent. *State v. Gove*, 34 N. H., 510. And it is objected by the defendant's counsel in argument that the description of the offense is imperfect and insufficient in that respect, the words lewdly and lasciviously associated not found in the statute, being inserted in the indictment. We think this objection is not well founded, for the reason that those words may be stricken from the indictment as surplusage, and there still remains a clear and a distinct description of the statutory

offense, charged in the very language of the statute, namely, that the respondent, on, etc., did and still does cohabit with one Charlotte M. Johnson, single woman, etc.

But the indictment does not allege, in so many words, that Charlotte M. Johnson, a single woman, was not the lawful wife of Thaddeus B. Clark, a married man; and this is the fault upon which the motion in arrest was based, and which is mainly insisted on now by the defendant in support of that motion.

The case shows that it distinctly appeared at the trial, and was not questioned, that Norton, Hudson and Johnson were three different persons, and without this the verdict sufficiently settles the fact that Johnson was not the wife of the defendant Clark. Under the circumstances, it would seem to be a waste of time to inquire whether a form, that appears to have been used and approved without objection, is strictly and technically perfect or not. The objection comes too late. If the averment that Thaddeus B. Clark, a married man, cohabited with Charlotte M. Johnson, a single woman, is not a sufficient allegation that Johnson is another person from the lawful wife of Clark, we think the defect is one of form, and open to amendment under Gen. Stats., ch. 242, sec. 13. It differs widely from the cases referred to in the defendant's brief, where the fault was in the description of the offense.

The objections must all be overruled, and there must be

Judgment on the verdict.

STATE vs. GOODENOW.

(65 Me., 30.)

ADULTERY: *Criminal intent — Ignorance of the law.*

On the trial of an indictment for adultery, the respondents offered to prove that they acted in good faith under the advice of a justice of the peace, and honestly thought they were committing no offense. *Held*, that the evidence was properly excluded.

Ignorance of the law is no excuse for crime.

To constitute a crime, there must be a criminal intent, but when an act is unlawful, an intent to do that act, having a full knowledge of the facts, is a criminal intent without regard to the party's knowledge of the law or that the act is unlawful.

INDICTMENT, alleging adultery on November 21, 1873.

The female defendant was legally married to George W. Hussey, April 30, 1861, at Turner, where they subsequently cohabited as husband and wife. They afterwards separated; and, October 15, 1865, the defendants were united in marriage by one Isaac J. York, a justice of the peace, and they ever afterward cohabited as husband and wife. There was evidence that, December 14, 1873, George W. Hussey was alive at Byron, Michigan (the evidence being that his mother received a letter of that date, purporting to come thence from him by due course of mail), and that no divorce had ever been decreed between George W. Hussey and Lydia Hussey by the courts of this state.

The defendants offered to prove that, prior to June, 1865, George W. Hussey had deserted and abandoned the said Lydia, and that in June, 1865, he married another woman from Toronto, Canada, and introduced her to several persons in Portland, in this state, as his wife, and exhibited to them a certificate of the last named marriage; that he soon after left this state and had not returned; that October 16, 1865, the defendants exhibited to said York affidavits from various parties that Geo. W. Hussey had married another woman; that they were thereupon advised by said York that they could legally intermarry; and that they did so intermarry in good faith; all of which the presiding judge excluded, and the defendants, the verdict being guilty, excepted.

L. H. Hutchinson and *A. R. Savage*, for the defendants:

I. To sustain an indictment for adultery, three particulars must be proved; the *corpus delicti*; that one of the parties had been previously married to some other person, and that such person was alive at the time of the acts of adultery complained of. 3 Greenl. Ev., §§ 204, 207; 2 Whart. Crim. Law, §§ 2651-2; 43 Me., 258. These each must be proved. As regards the third, the mere presumption of the continuance of life is not sufficient. 3 Greenl. Ev., 207.

In the present case, the only evidence tending to show that the former husband of Mrs. Hussey was alive at the time alleged in the indictment was a letter purporting to have come from him to his mother. The handwriting of the letter was not even identified; and this evidence is, we contend, clearly insufficient to send a man and woman to state prison upon.

II. The defendants appear to have acted in entire good faith.

They sought and acted upon the advice of the officiating magistrate, who was presumably qualified to give them proper advice.

There are numberless instances where parties are relieved from the consequence of their acts, done in accordance with the advice of those whom they may reasonably suppose to be qualified to give the same, including magistrates and such; much more, they should not be condemned.

The evidence offered by the defendants, and excluded by the presiding justice, shows there was no knowledge or intent of committing any wrong, much less a crime.

Knowledge and intent, where material, must be shown by the prosecutor. 1 Whart. Crim. Law, § 631; *Wright v. The State*, 6 Yerg., 345.

The evidence offered and excluded shows that the defendants acted in good faith, and that the best meaning person by a mistake may be thrust into prison for a term of years.

G. C. Wing, county attorney, for the state, cited as directly in point *Commonwealth v. Nash*, 9 Met., 472; *Same v. Thompson*, 6 Allen, 591, and same parties, 11 Allen, 23.

PETERS, J. The respondents are jointly indicted for adultery, they having cohabited as husband and wife while the female respondent was lawfully married to another man who is still alive. The only question found in the exceptions is, whether the evidence offered and rejected should have been received. This was, that the lawful husband had married again, and that the justice of the peace who united the respondents in matrimony advised them that, on that account, they had the right to intermarry, and that they believed the statement to be true, and acted upon it in good faith. It is urged for the respondents, that those facts would show that they acted without any guilty intent. It is undoubtedly true, that the crime of adultery cannot be committed without a criminal intent. But the intent may be inferred from the criminality of the act itself. Lord Mansfield states the rule thus: "Where an act, in itself indifferent, becomes criminal if done with a particular intent, there the intent must be proved and found; but where the act is in itself unlawful, the proof of justification or excuse lies on the defendant; and in failure thereof, the law implies a criminal intent." Here the accused have intentionally committed an act which is in itself unlawful. In

excuse for it, they plead their ignorance of the law. This cannot excuse them. Ignorance of the law excuses no one. Be sure this maxim, like all others, has its exceptions. None of the exceptions, however, can apply here. The law, which the respondents are conclusively presumed to have known, as applicable to their case, is well settled and free from all obscurity or doubt. It would perhaps be more exact to say, they are bound as if they knew the law. Late cases furnish some interesting discussions upon this subject. *Cutter v. State*, 36 N. J., 125; *United States v. Anthony*, 11 Blatchf., 200; *United States v. Taintor*, id., 374; 2 Greenl. Cr. Law, 218, 244, 275, 589. *Black v. Ward*, 27 Mich., 191; *S. C.*, 15 Am. Law R., 162, and note, 171. The rule, though productive of hardships in particular cases, is a sound and salutary maxim of law. Then, the respondents say that they were misled by the advice of the magistrate, of whom they took counsel concerning their marital relations. But the gross ignorance of the magistrate cannot excuse them. They were guilty of negligence and fault, to take his advice. They were bound to know or ascertain the law and the facts for themselves, at their peril. A sufficient criminal intent is conclusively presumed against them, in their failure to do so. The facts offered in proof may mitigate, but cannot excuse the offense charged against them. There is no doubt that a person might commit an unlawful act, through mistake or accident, and with innocent intention, where there was no negligence or fault, or want of care of any kind on his part, and be legally excused for it. But this case was far from one of that kind. Here it was a criminal heedlessness on the part of both of the respondents to do what was done by them. The Massachusetts cases, cited by the counsel for the state, go much further than the facts of this case require us to go in the same direction, to inculcate the respondents. Besides those cases, see also *Commonwealth v. Elwell*, 2 Met., 190; *Commonwealth v. Farren*, 9 Allen, 489; *Commonwealth v. Goodman*, 97 Mass., 117; *Commonwealth v. Emmons*, 98 id., 6. We see no relief for the respondents except, if the facts warrant it, through executive interposition.

Exceptions overruled.

Appleton, C. J., Walton, Barrows, Danforth and Virgin, JJ., concurred.

McKAY vs. STATE.

(44 Tex., 43.)

ASSAULT: Intent — Ability to injure — Pointing unloaded weapon.

On an indictment for an assault and battery, where the evidence showed that the respondent pointed an unloaded pistol at the prosecutor, at the distance of six paces, and ordered the prosecutor to kneel down, which he did through fear, it was *held* that this did not constitute an assault.

Under the Texas code pointing an unloaded weapon, without any actual intent to do physical injury, is not an assault.

In order to constitute an assault, there must be an actual intent to do a physical injury.

Where there is no ability to inflict injury, and this is known to the respondent, he cannot entertain the intent to do injury.

Fear on the part of the prosecutor cannot constitute a threatening act an assault, when there is no intent or ability to do physical injury, even though such fear is reasonable under the circumstances.

ROBERTS, C. J. The charge of the court, which presents the main issue in the case, is as follows:

"If the jury believe, from the evidence, that the defendant pointed an unloaded pistol at Daniel Duke (within shooting distance, if the pistol had been loaded), with intent to frighten him, at the same time ordering him to kneel down, and that the said Duke, not knowing that the said pistol was not loaded, was made to feel afraid, and caused to kneel down, the defendant is guilty of an assault."

This charge was given at the instance of the district attorney, the facts in proof being substantially in correspondence with it. The defendant's counsel asked three charges, to wit: That if the pistol was not loaded, or if defendant could not shoot Duke with it, or if he did not intend to shoot him, he could not be convicted; which were all refused by the court. The defendant was found guilty of a simple assault, and fined twenty-five dollars. He moved for a new trial because of the refusal of these charges, and that the verdict was not warranted by the evidence, as well as on other grounds, which being overruled, he gave notice of appeal.

This charge above set out, and the refusal of the counter charges, are the main matters deserving notice on the appeal.

This charge makes an apparent attempt to commit a battery by McKay, which produces the feeling of shame or fear in the

mind of Duke, an assault. This is believed to be erroneous, because, the pistol of McKay being unloaded, it was impossible for him to have committed a battery upon the person of Duke, and because the actual injury in mind, such as shame or fear, suffered by Duke, which was caused by the apparent attempt of McKay to commit a battery on his, Duke's, person, is not a legal injury that constitutes an assault, it being shown that, by the means used, McKay did not have the ability to commit a battery.

These propositions, it is believed, can be maintained by a due consideration of the provisions of our penal code, that define and explain the offenses of assault and of assault and battery, which will lead to three important conclusions, having reference to this case:

1. That there is a marked difference between the legal injury resulting from the act and intent of the assailant, in the attempt to commit a battery, and in the actual injury of shame or fear, in the mind of the assailant, that may have been intended and produced by the act of the assailant.

2. To effect the legal injury indictable as an assault, the assailant must have the ability to commit a battery by physical violence on the person by the means used.

3. The actual injury of shame or fear in the mind of the assailed is not a necessary element in the offense of an assault, and the legal injury can exist as well without it as with it, and when shown to have been produced, it is pertinent in the case only as matter of aggravation to the legal injury.

An assault is an attempt to commit a battery. The variation in the terms contained in the definition are only different modes in stating the same thing. The definition is, that "any attempt to commit a battery, or any threatening gesture, showing in itself, or by words accompanying it an immediate intention, coupled with an ability to commit a battery, is an assault."

Thus it is necessary to understand precisely what it takes to constitute a battery. The definition is, "the use of any unlawful violence upon the person of another, with intent to injure him, whatever be the means or degree of violence used, is an assault and battery."

This definition makes it necessary that two things should concur — one physical, the other mental — an act, an intent accom-

panying it, on the part of A., when he commits a battery on B., each of which requires a particular examination separately.

As to the physical act done by A., let it be supposed that A. strikes B. a blow with a stick on the head, and wounds him by a bruise that is painful; it is the blow given by A., and not the wound left on the head of B. that constitutes the physical act that is meant in the first part of the definition, by the expression, "use of violence upon the person of another." Violence upon the person, as here used, means the force upon the person, referring to the act of A. in using it on the person, and not to the intended effects on B. in receiving it on his person; for the existence of the pain, or shame, or other disagreeable emotion of the mind, on the part of B., as the effect or result of the blow on his person, is wholly immaterial, and need not be proved, and when proved in any case, is proved only as an aggravation of, and not as a necessary fact to the complete establishment of the battery. The means used by A. to exert the force on the person of B. may be anything capable of producing physical force, as the hand, the foot, a stick, a rock thrown by him, or a bullet shot out of a gun or pistol by him, so as to take effect on the person, however slight. Hence, it is described in the books by the expression, "the least touching of the person of another," the word touching having reference to the act of A. that took effect on the person of B., and not to the bodily or mental sensation of B. produced by it, further than that it did touch him. The case above supposed, presupposes and evinces that A. has had the physical capacity to do the act, and also embraces the additional element that he intended to do it, or that in the act of doing it, he intended to do something else, which was done so negligently or carelessly or recklessly as to be tantamount in law to the intention to do what he did; otherwise, the act would be purely accidental, and therefore not culpable.

In addition to the physical act done by A., with the accompanying intention, direct or indirect, as just specified, it must also be done "with intent to injure" B., in order to render the battery unlawful. This injury intended by A., the assailant, may be to the mind of B. as well as to his person. Our criminal code provides that "the injury intended may be either bodily pain, constraint, a sense of shame or other disagreeable emotion of the mind."

It is not to be understood, however, that the effects upon the body and mind here enumerated as examples embrace all of the effects that may be intended by A., the assailant, to be produced on the body or mind of B., by the act of A. in committing a battery upon him. For in the same article it is said, "when an injury is caused by violence to the person, the intent to injure is presumed, and it rests with the person inflicting the injury to show the accident or innocent intention." Thus, in a battery, when A. has used physical force upon the person of B., the combined intention to do the act and to injure him by doing it, thus embracing all of the intents necessary to complete the offenses, whatever they may be, is presumed in law as against A., unless it be shown that the act done by him was purely accidental, or that the intention with which the act was done by A. was innocent.

As in a case of homicide, the act of killing being proved, the malicious intent is presumed, and the legal injury is held to be consummated, whatever may be the one of thousands of motives that might have prompted the act, or whether any motive or specific intent can be discovered or not, unless some evidence can be adduced establishing a mitigation, excuse or defense.

In assault and battery, the necessary act, to wit, the "use of violence upon the person of another," is easily understood. But the necessary "intent to injure him" is not so easily explained by an affirmative description. Still, the necessary act being proved, the necessary intent to injure is known to exist as a legal necessity, whether we can discover, understand or explain it or not, so that the two concurring will constitute the legal injury of assault and battery, unless it be shown that the act was accidental or the intention was innocent. It may therefore be said that, practically, in legal contemplation, the proof of the necessary act either is or carries with it the proof of the necessary intention to injure, so as to constitute the legal injury, unless it is rebutted by evidence showing that the legal presumption should not be indulged, which may not be by showing an absence of intention to injure, but by showing that the intention was innocent with which the act was done.

This provision for presuming an intent from the proof of the act, pervades the whole criminal law, and is found prescribed in our criminal code as follows:

"Art. 1654. The intention to commit an offense is presumed

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whenever the means used is such as would ordinarily result in the commission of the forbidden act.

"Art. 1655. On the trial of any criminal action, when the facts have been proved which constitute the offense, it devolves on the accused to establish the facts or circumstances on which he relies to excuse or justify the prohibited act or omission." (Paschal's Dig., pp. 399, 400.)

The term "intent to injure" as part of the definition of an assault and battery, like the word malice in that of murder, can not be described in its full scope and meaning by an affirmative description only; and hence it is necessary to give an explanation of it so as to embrace any and every intent with which the act of violence upon the person of another is committed which is not shown to be an innocent intent, thus giving a negative as well as an affirmative description of what is meant, both of which is done in our code. (Paschal's Dig., art. 2138.)

Still, it is not necessary in assault and battery that any of the actual injuries that are expressly mentioned in the code should be felt or experienced in body or mind by B., the party assailed, as the result of the act of A. making the blow on the person of B., but the assault and battery and legal injury are complete if A. intended any such injury in striking the blow, and the law makes him intend the injury of some sort, unless the act is accidental or intent is innocent, and is so shown to be.

It follows necessarily, then, that what A. did, and intended to do, as proved or presumed, is what the law regards as the test of the legal injury in determining whether or not the offense of unlawful assault and battery has been committed, and not the fact of the pain, or constraint, or sense of shame or other disagreeable emotions of the mind of the party upon whose person the force has been used by the assailant. For the law regards the least touching of the person of another, unless accidentally or innocently done, an injury to society—to the state—whether the individual touched has thereby suffered the actual injury, either in body or mind, intended by the assailant or not.

An assault by A. upon B. embraces all of the elements of an assault and battery on him, with the single exception of the want of completeness in the performance of the act commenced by A., to be done which, if completed, would have been a battery.

An assault is an attempt to commit a battery; and "an at-

tempt is, according to common legal understanding, an intent to do a thing combined with an act which falls short of the thing intended." (1 Bishop's Cr. Law, sec. 659.) The capacity to do the violence upon the person by the means used is equally implied and necessary in assault as in a battery; and the actual suffering of pain, constraint, shame, or other disagreeable emotion of the mind, on the part of the individual assailed, is equally unnecessary as an independent fact, and its nonexistence, if proved or admitted in any case, would not be a full defense to an action, either civil or criminal. This attempt is fully described in our code, so as to embrace every supposable mode of assault, as follows: "Any threatening gesture, showing in itself, or by words accompanying it, an immediate intention, coupled with the ability to commit a battery, is an assault." It must be noticed that this does not say "intention, coupled with the ability to commit" an injury on the individual, but "intention coupled with the ability to commit a battery" on him, which embraces the ability and the intention to use violence upon the person of the individual, and also the intention to thereby inflict injury of body or mind on him, as heretofore explained as being either proved or presumed.

Nor does it say any threatening gesture, showing in itself, or by words accompanying it, an immediate intention, coupled with an apparent ability to commit a battery, substituting in law, the appearance of an assault for an assault in fact. To prevent such a construction, the code provides that "by the terms 'coupled with an ability to commit,' as used in article 475, is meant:

"1. That the person making the assault must be in such a position that, if not prevented, he may inflict a battery on the person assailed.

"2. That he must be in such distance of the person so assailed as to make it within his power to commit the battery by the use of the means with which he attempts it."

And, lest that should not be plain enough, it is added that "it follows that one who is at the time of making an attempt to commit a battery under such restraint as to deprive him of the power to act, or who is at so great a distance from the person assailed as that he cannot reach his person by the use of the means with which he makes the attempt, is not guilty of an assault." And

still not satisfied with that, it is added that "pointing an unloaded gun, or the use of any like means with which no injury can be inflicted, cannot constitute an assault."

The word injury, as used in this last sentence, means the legal injury produced by an intentional use of force on the person of another, and not the actual injury of pain, or constraint, or shame, or other disagreeable emotions of the mind in the person assailed. For, if the legal injury or violence to the person was inflicted by the means used, it would not be material that it should produce the actual injury of the body or mind, such as shame, fear, and the like, provided any injury was intended. The word injury is used in these two different senses in explanation of this offense, from which arises the only obscurity or uncertainty attending the subject; but all which, it is believed, is susceptible of an easy explanation in harmony with the principles that have been announced. For instance, "when an injury is caused by violence to the person, the intent to injure is presumed, and it rests with the person inflicting the injury to show the accident or innocent intention." Here, it is the legal injury that is caused by the violence to the person and from which the intention to commit the actual injury of the body or mind of the person assailed is presumed.

And again: "Any means used by the person assaulting, as by spitting in the face or otherwise, which is capable of inflicting an injury, comes within the definition of an assault, or an assault and battery, as the case may be." Here it is used in the sense of a legal injury, caused by physical violence used or attempted on the person, as it is in the article last quoted. This is so inferred from the example given of physical force, as spitting in the face, as well as those given in the preceding article, all of which as enumerated are appropriate means for inflicting physical force upon the person, and none of them that are enumerated are appropriate means, such as words, threats, hostile appearances, or the like, calculated to produce a moral or mental force upon the mind of the person assailed.

Threats and hostile appearances would often be as appropriate means of producing the actual injury of constraint, shame, or other disagreeable emotions of the mind, as blows with the hand, and frequently more so, and it is hardly to be supposed that they would have been omitted in the very careful enumera-

tion of the means that could be used in committing an assault, or assault and battery.

In this view of the provisions of the code, it is not intended to lay down authoritative rules, as applicable to other cases coming under the articles reviewed, which are not directly applicable to this case, but to present general views preparatory to the proper consideration of the main question here now, which is, What is the legal effect of the pistol being unloaded?

Now, to apply these principles, so far as applicable, as deduced from our penal code, to the facts of this case, and to the charge of the court thereon. McKay pointed an unloaded pistol at and threatened to shoot Duke, ordering him to get on his knees, which he did. This was an act in itself, and coupled with words showing an intention to shoot him, with the intent to put him under constraint, and to produce shame or other disagreeable emotion of his mind. It was clearly an apparent assault, and to Duke, who was doubtless ignorant that the pistol was unloaded, it was calculated to and did excite fear, and a reasonable apprehension of death or serious bodily injury, and was so intended by McKay. It falls short of an assault under our code, because it is expressly declared therein that pointing an unloaded gun at a person cannot be an assault, giving the reason, in the same connection, that it is a means with which no injury can be inflicted, and it might be added, that the person pointing the gun, knowing it to be unloaded, could not possibly intend, then, to shoot the person pointed at.

The injury that such an act cannot produce is the legal injury of physical violence to the person of the individual pointed at, in contradistinction to the actual injury of him by constraint, shame, or other disagreeable emotion of the mind, which latter injury it most assuredly could, and generally would, be almost certain to produce. If it had been intended to make this actual injury of constraint or fear, when produced by any adequate means, the test of the criminality of the act producing it, surely the legislature would not have picked out the pointing of a gun, though unloaded, as the one to exempt, as a means that could not produce it, which act, above all others, most commonly produces that effect, when it is not known by the person pointed at to be unloaded. Yet it is so declared, without qualification, condition

or exception, that "pointing an unloaded gun cannot constitute an assault."

Seriously threatening a man to kill him, done in anger, is well calculated to produce the same effect, generally in a lighter degree only, and it is not enumerated as one of the means that can produce the legal injury that is indictable as an assault. Both together, pointing the unloaded pistol and the threats, as in this case, would not alter the nature of the actual injury of constraint or fear, or disagreeable emotion, but could only increase it in degree, which increase is only a matter of aggravation, and cannot be made a distinct ground of legal injury, when neither the pointing the unloaded pistol nor the threats, separately, can amount to a legal injury. (See Criminal Code, from arts. 2137 [475] to 2148 [486], both inclusive, Paschal's Dig.) As the acts and words of McKay put Duke under constraint, it may amount to false imprisonment, which may be accomplished by threats and various other means not amounting to, and do not, therefore, necessarily include an assault (Paschal's Dig., art. 2169 [508]). When "words are used, which are reasonably calculated to produce and do produce an act which is the immediate cause of death, it is homicide," committed by the person using them, and is then of such serious consequence that the law takes notice of the words as constituting the cause of the death (Paschal's Dig., art. 2207 [546]). There is no provision giving such or similar effect to mere words in the minor offenses, such as assault.

Whether pointing an unloaded gun or pistol is an assault, when the person pointed at is ignorant of the fact of its being unloaded, has long been a mooted question, which has been decided both ways by the courts, in both England and America, and as a question at common law, in reference to all of the decided cases bearing upon it, civil and criminal, it is one of difficulty, that has often been liable to changes of opinion and decisions, as may be seen by reference to the numerous cases cited in the elaborate brief of the attorney general in this case, for the definite settlement of which long continued conflict, it may be presumed, it was positively and unqualifiedly declared in the penal code, that "pointing an unloaded gun, or the use of any like means, with which no injury can be inflicted, cannot constitute an assault," which would be imperative on this court, had all the decisions, both in England and America, been one way,

and that against this rule, instead of being vascillating and conflicting, as they have been.

Mr. Bishop, in his most valuable work on criminal law, says: "An assault is any unlawful physical force, partly or fully put in motion, which creates a reasonable apprehension of immediate physical injury to a human being" (2 vol., sec. 32).

In the explanation of the different parts of the definition, he says, in reference to the peril or fear: "There is no need that the party assailed be put in actual peril, if only a well founded apprehension of danger is created," for the suffering is the same in one case as in the other, and the breach of the public peace is the same." He then gives the pointing an unloaded pistol as an instance, and says: "There must be, in such cases, some power, actual or apparent, of doing bodily harm, but apparent power is sufficient."

This makes an apparent force sufficient if it creates a well grounded apprehension of peril in the party assailed, and is believed to be contrary to the provisions of our code in two respects, to wit, the apparent force is made tantamount to the actual, and the well grounded apprehension of peril on the part of the assailed is made one of the elements of assault, whereas, by our code, if on the part of the assailant, the act coupled with the necessary intent to injure, as proved or presumed, is sufficient, it is immaterial whether or not fear of danger or well grounded apprehension of peril is created on the assailed, or even whether he was aware of the attempt or not.

If the pistol had been loaded, and otherwise in condition to shoot when it was intentionally pointed at Duke within a distance that it could take effect if discharged, the manifestation of anger, and the threats of McKay would have constituted extraneous and affirmative evidence of an express intention to injure, necessary and sufficient to make the assault complete. So, too, the pointing the pistol alone, under like circumstances if loaded, without the manifestation of anger and the threats, would of itself carry with it the presumption of the necessary intention to injure. Such act intentionally done by McKay would have put in imminent danger the life of Duke, who had given him no just cause to do it, and it is difficult to imagine how it could be possible to show McKay's intention in doing such an act to be innocent.

But, on the other hand, the pistol being unloaded, the pointing of it was not an act, nor the commencement of an act, that could possibly have resulted in a battery by such a use of it, and, therefore, the act necessary as an ingredient in an assault was totally wanting. For the error in the charge of the court, the judgment is reversed and the cause remanded.

Reversed and remanded.

IRLAND, J., did not sit in this case.

STATE *vs.* WILLIAMS.

(75 N. C., 134.)

ASSAULT AND BATTERY: *Rules of discipline — Voluntary associations.*

On the trial of an indictment for assault and battery, the evidence showed that the prosecutrix and the respondents were members of a society called Good Samaritans. The society had a ceremony of expulsion from the society. The prosecutrix becoming remiss in her duties, the respondents proceeded to perform the ceremony of expulsion, which consisted in suspending the prosecutrix from the wall by a cord fastened around her waist, the prosecutrix resisting: *Held*, that respondents were guilty of an assault and battery. Rules of discipline of voluntary associations must conform to the laws.

INDICTMENT for an Assault and Battery, tried before MOORE, J., at spring term, 1876, of Martin Superior Court.

The defendants and the prosecutrix were members of a benevolent society in Hamilton, N. C., known as the "Good Samaritans," which society had certain rules and ceremonies known as the ceremonies of initiation into and expulsion from the society.

The prosecutrix, having been remiss in some of her obligations, and having been called upon to explain, became violent. The defendants, with others, proceeded to perform the ceremony of expulsion, which consisted in suspending her from the wall by means of a cord fastened around her waist. This ceremony had been performed upon others theretofore, in the presence of the prosecutrix. She resisted to the extent of her ability.

There was conflicting evidence as to whether they lifted her from the floor, or intended to treat her differently from others who had been expelled, and it was shown that as soon as she cried out that the cord hurt her, she was released, and fainted immediately. Her dress was torn from her.

The defendants' counsel contended that if the defendants only intended to perform the usual ceremony of expulsion, and were actuated by no other motive, and did not intend to hurt her, they were not guilty. That in order to commit a crime, there must be an unlawful act, coupled with a vicious will.

HIS Honor held that in any view of the case, if the defendants tied the cord around the waist of the prosecutrix as stated, they were guilty.

There was a verdict of guilty, and judgment thereupon. The defendants appealed.

Attorney General *Hargrew* for the state. *Mullen & Moore*, and *Walter Clark*, for prisoners.

BYNUM, J. When the prosecutrix refused to submit to the ceremony of expulsion established by this benevolent society, it could not be lawfully inflicted. Rules of discipline for this and all voluntary associations must conform to the laws. If the act of tying this woman would have been a battery had the parties concerned not been members of the society of "Good Samaritans," it is not the less a battery because they were all members of that humane institution. The punishment inflicted upon the person of the prosecutrix was wilful, violent, and against her consent, and thus contained all the elements of a wanton breach of the peace. *Belt v. Hansley*, 3 Jones, 131. There is no error. This will be certified.

Judgment affirmed.

HENDRIX vs. STATE.

(50 Ala., 148.)

ASSAULT AND BATTERY: *Recaption of stolen property — Oath to jury — Breach of the peace.*

On the trial of an indictment for assault and battery, the respondent offered to prove that the assault and battery was committed in attempting to retake a horse which had been stolen from him a short time before, from a person in whose possession he found it. *Held* inadmissible, and that it would not excuse, justify, or mitigate the offense.

A man has no right to retake stolen property by a breach of the peace.

The oath to the jury in this case, viz.: "Well and truly to try the issue joined and a true verdict to render according to the evidence," was held sufficient under the Alabama statute.

BRICKELL, J. The defendant was indicted for an assault and battery on one Dallas Parvin. Evidence was offered on the trial tending to prove the commission of the assault and battery, and to show that it was caused by the refusal of the prosecutor to give up to the defendant possession of a mare which he was riding, and which was claimed by the defendant.

The defendant offered to prove that the mare was his property and had been stolen from him, a short time before, in Sanderdale county. The state objected to the admission of this evidence, and the court sustained the objection; and this ruling of the court, to which an exception was reserved by the defendant, is now assigned as error.

If the true owner is deprived of the possession of his property by fraud, force, or any other illegality, he may lawfully reclaim and retake it, whenever he can do so without a breach of the peace. But, as it is said by Blackstone, "The public peace is a superior consideration to any one man's private property; and as, if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease, the strong would give law to the weak, and every man would revert to a state of nature; for these reasons, it is provided that this natural right of recaption shall never be exerted where such exertion must occasion strife and bodily contention, or endanger the peace of society." 3 Wendell's Blackstone, 4. If the evidence offered had been admitted, it could not have justified, excused, or mitigated the offense with which the defendant was charged. If his purpose was to reclaim his horse, he should have sought that purpose, not by violence, but through the peaceful remedies of the law. The law cannot countenance the substitution of physical violence in the place of these remedies. The court did not err in the exclusion of the evidence.

2. There was no error in the oath administered to the jury. They were sworn "well and truly to try the issue joined, and a true verdict to render according to the evidence."

This is a substantial compliance with the statute (Rev. Code, § 4092), and nothing more is required.

Judgment affirmed.

COMMONWEALTH vs. COLLBERG.

(119 Mass., 351.)

ASSAULT AND BATTERY: *Fighting by mutual agreement.*

On an indictment for assault and battery where the evidence was that the respondent and another, by mutual agreement, went out to fight one another in a retired place, and did fight in the presence of from fifty to one hundred persons, and that both were bruised in the fight, which continued until one of the parties declared himself satisfied, it was *held* that each was guilty of an assault and battery on the other.

All fighting is unlawful, and it is of no consequence that it is by mutual agreement and without anger or malice on the part of those engaged in it.

ENDICOTT, J. It appears by the bill of exceptions that the parties by mutual agreement went out to fight one another in a retired place, and did fight in the presence of from fifty to one hundred persons. Both were bruised in the encounter, and the fight continued until one said that he was satisfied. There was also evidence that the parties went out to engage in and did engage in a "run and catch" wrestling match. We are of opinion that the instructions given by the presiding judge contained a full and accurate statement of the law.

The common law recognizes as not necessarily unlawful certain manly sports calculated to give bodily strength, skill and activity, and "to fit people for defense, public as well as personal, in time of need." Playing at cudgels or foils, or wrestling by consent, there being no motive to do bodily harm on either side, are said to be exercises of this description. *Fost. C. L.*, 259, 260. *Com. Dig. Plead.*, 3 m., 18.

But prize fighting, boxing matches, and encounters of that kind, serve no useful purpose, tend to breaches of the peace, and are unlawful even when entered into by agreement and without anger or mutual ill will. *Fost. C. L.*, 260; 2 *Greenl. on Ev.*, § 85; 1 *Steph. N. P.*, 211.

If one party license another to beat him, such license is void, because it is against the law. *Matthew v. Ollerton*, *Comb.*, 218. In an action for assault, the defendant attempted to put in evidence that the plaintiff and he had boxed by consent, but it was held no bar to the action, for boxing was unlawful, and the consent of the parties to fight could not excuse the injury. *Boulter v. Clark*, *Bull. N. P.*, 16. The same rule was laid down in

Stout v. Wren, 1 Hawks (N. C.), 420; and in *Bell v. Hansley*, 3 Jones (N. C.), 131. In *Adams v. Waggoner*, 33 Ind., 531, the authorities are reviewed, and it was held that it was no bar to an action for assault that the parties fought each other by mutual consent, but that such consent may be shown in mitigation of damages. See *Logan v. Austin*, 1 Stew. (Ala.), 476. It was said by Coleridge, J., in *Regina v. Lewis*, 1 C. & K., 419, that "no one is justified in striking another except it be in self-defense, and it ought to be known, that whenever two persons go out to strike each other, and do so, each is guilty of an assault;" and that it was immaterial who strikes the first blow. See *Rea v. Perkins*, 4 C. & P., 537.

Two cases only have been called to our attention, where a different rule has been declared. In *Champer v. State*, 14 Ohio St., 437, it was held that an indictment against A. for an assault and battery on B., was not sustained by evidence that A. assaulted and beat B. in a fight at fisticuffs, by agreement between them. This is the substance of the report, and the facts are not disclosed. No reasons are given or cases cited in support of the proposition, and we cannot but regard it as opposed to the weight of authority. In *State v. Beck*, 1 Hill (S. C.), 363, the opinion contains statements of law in which we cannot concur.

Exceptions overruled.

DOEHRING vs. STATE.

(49 Ind., 56.)

ASSAULT AND BATTERY: *Arrest—Dangerous weapon—Question of fact—Policeman—Presumption.*

On an indictment against the respondent, a policeman, for an assault and battery on a brother of one whom he had arrested for larceny, without a warrant, and who was apparently endeavoring to assist the prisoner to escape, it was *held*, that what is a dangerous weapon is a question of fact and not of law, and that the court has no right to instruct the jury as matter of law, that a policeman's mace is a dangerous weapon.

A peace officer may lawfully arrest, without a warrant, one whom he has reasonable cause to suspect of a felony, and it is not necessary for his justification to establish the guilt of the suspected person.

It appearing that respondent was a policeman, the court will presume that he possesses the ordinary powers of a peace officer.

BUSKIRK, C. J. This was an indictment against the defendant

for an assault and battery upon the body of one Thomas Green. There was a trial by jury, a verdict of guilty, assessing a fine of one cent. There was a motion for a new trial, which was overruled, a motion in arrest of judgment, which was also overruled, and the court rendered judgment on the verdict.

The defendant was a policeman, of the city of Evansville, and as such, was informed that a brother of the prosecuting witness, Jim Green by name, had stolen a box of cigars. Upon that information, he arrested said Green. He was taking the prisoner to the city prison, and on his way there, passed the house of the prosecuting witness. The prisoner expressed a desire to see his brother, the prosecuting witness, and was told by the defendant that he could see him outside the house.

All the persons present agree in their testimony, that the prisoner attempted to either go into the house or escape, and that the appellant knocked him down twice with his mace. In the scuffle that ensued, the appellant and the prisoner got around the corner of the house of the prosecuting witness, about ten feet from the corner. At this point of time, the prosecuting witness heard the noise, and went out and placed his hand upon the shoulder of the appellant, and turned him around to the gas light. The theory of the state is, that the prosecuting witness heard the noise and went out to stop it, without knowing who the parties were, and that he gently laid his hand upon the appellant and turned him around to the gas light to see who he was. On the other hand, it is contended that the prosecuting witness knew who the parties were, and went out to aid his brother in escaping. All the witnesses agree, that he laid his hand on the officer before he was struck. The appellant struck him over his head with a mace. It is further argued, that it can make no difference what the real purpose of the prosecuting witness was, if the appellant had reason to believe, and did believe, that his purpose was to aid in the escape of his brother. The prisoner did, in fact, make his escape.

Counsel for appellant contend that the second instruction was erroneous, because the court told the jury that the weapon used was a dangerous one, when the question should have been submitted to the jury to determine, as a question of fact. The instruction was in these words: "In coming to a conclusion in this case, it is important that you should consider the character

of the weapon used. Custom seems to sanction the use by police establishments of pistols, maces, and other dangerous and deadly weapons, but they ought to use such weapons prudently. There can be no doubt, and as to this the jury and counsel for the state and defendant will fully agree with me, that the weapon used by the defendant in this case was a dangerous weapon. Did he use it recklessly or cruelly, or did he use it prudently?"

It is the duty of the court to charge the jury as to all matters of law applicable to the facts proved. It is the province of the jury to ascertain the facts. The question of whether a particular weapon was or was not dangerous, was a question of fact, and not of law, and hence should have been submitted to the jury for ascertainment. *Barker v. The State*, 48 Ind., 163.

It is also claimed that the court erred in giving the following instruction: "If the defendant made the arrest of James Green for a felony, on information and not on view, he made it at his own peril; and in order for him to justify the assault upon Thomas Green, the prosecuting witness, when it becomes a matter of inquiry, it devolves upon the defendant to show that the party under arrest was guilty of the crime for which he was arrested."

In our opinion, the instruction was clearly erroneous.

It never was necessary, under the law, for a peace officer to "show that the party under arrest was guilty of a crime for which he was arrested." A peace officer has a right to arrest without a warrant, when he is present and sees the offense committed. He has a right to arrest without a warrant on information, when he has reasonable or probable cause to believe that a felony has been committed; and herein there is a distinction as to the extent of his authority. In cases of misdemeanor, the officer must arrest on view or under a warrant; in cases of felony, he may arrest without a warrant, upon information, where he has reasonable cause. And the reasonable or probable cause is an absolute protection to him, "when it becomes a matter of inquiry," and in no case is he bound to establish the guilt of the party arrested. 1 Hilliard Torts; 49 Ind., 2d ed., 233, 234, 235, and notes.

In *Holley v. Mia*, 3 Wend., 350, the court held: "If an innocent person is arrested upon suspicion by a private individual, such individual is excused if a felony was in fact committed."

and there was reasonable ground to suspect the person arrested. But if no felony was committed by any one, and a private individual arrest without a warrant, such arrest is illegal though an officer would be justified if he acted upon information from another which he had reason to rely upon."

In *Samuel v. Paine*, 1 Doug., 359, Lord Mansfield held that if any person charge another with felony, and desire an officer to take him in custody, such charge will justify the officer, though no felony was committed.

In a MS. note of a case of *Williams v. Dawson*, referred to by counsel in *Hobbs v. Branscomb*, 3 Camp., 420, Mr. Justice Buller laid down the law, that "if a peace officer of his own head takes a person into custody on suspicion, he must prove that there was such a crime committed; but that if he receives a person into custody, on a charge preferred by another of felony or breach of the peace, then he is to be considered as a mere conduit, and if no felony or breach of the peace was committed, the person who preferred the charge alone is answerable."

In *Hobbs v. Branscomb*, *supra*, Lord Ellenborough, in speaking of the rule laid down by Judge Buller, said: "This rule appeared to be reasonable, and that very injurious consequences might follow to the public, if peace officers, who ought to receive into custody a person charged with a felony, were personally answerable, should it turn out that in point of law no felony had been committed."

In 1 Chit. Crim. Law, 22, the law is stated thus: "Constables are bound, upon a direct charge of felony, and reasonable grounds of suspicion laid before them, to apprehend the party accused, and if upon a charge of burglary, or other felony, he be required to apprehend the offender, or to make hue and cry, and neglect so to do, he may be indicted. And a peace officer, upon a reasonable charge of felony, may justify an arrest without a warrant, although no felony has been committed, because, as observed by Lord Hale, the constable cannot judge whether the party be guilty or not, till he come to his trial, which cannot be till after his arrest; and, as observed by Lord Mansfield in *Samuel v. Paine*, if a man charges another with a felony, and requires another to take him into custody, and carry him before a magistrate, it would be most mischievous that the officer should be bound first to try, and, at his peril, exercise his judgment in

the truth of the charge; he that makes the charge should alone be answerable; the officer does his duty in conveying the accused before a magistrate, who is authorized to examine and commit, or discharge."

The law applicable to arrests by a private person is stated with great precision and clearness by Tilghman, C. J., in *Wakeley v. Hart*, 6 Binn., 316; where, after quoting a provision of the state constitution and commenting thereon, it is said: "But it is nowhere said, that there shall be no arrest without warrant. To have said so would have endangered the safety of society. The felon, who is seen to commit murder or robbery, must be arrested on the spot or suffered to escape. So although not seen, yet if known to have committed a felony, and pursued with or without a warrant, he may be arrested by any person. And even when there is only probable cause of suspicion, a private person may without warrant at his peril make an arrest. I say at his peril, for nothing short of proving the felony will justify the arrest. These are principles of the common law, essential to the welfare of society, and not intended to be altered or impaired by the constitution."

We think the instruction under examination, when applied to arrests by a private person, expresses the law correctly, but when applied to arrests by peace officers, is clearly erroneous.

It is, however, insisted by the Attorney General, that there is nothing in the record showing that the appellant possessed the powers of an ordinary peace officer. The city of Evansville is governed by a special charter, which does not define the powers of the police force. The charter confers on the common council power "to establish, organize and maintain a city watch, and prescribe the duties thereof," and "to regulate the general police of the city."

The ordinances of the city, defining the duties and prescribing the powers of the police force, were not read in evidence. It is earnestly claimed that we cannot, under these circumstances, indulge the presumption that the appellant possessed the powers of a conservator of the peace. We take notice of the existence of, and the powers conferred by, the city charter, and that Evansville has a city government. It was proved that the appellant was acting as a policeman in such city. We think we should indulge the presumption, that the police force of such a

city possessed the ordinary powers of peace officers at common law, but we do not think the presumption should be carried beyond the powers possessed by conservators of the peace at common law.

A full and accurate statement of the powers and duties of the police force, under the general act of incorporation of cities, will be found in *Boaz v. Tate*, 43 Ind., 60.

The judgment is reversed, with costs; and the cause is remanded for a new trial, in accordance with this opinion.

Judgment reversed.

COMMONWEALTH vs. HAWKINS.

(11 Bush, Ky., 603.)

ASSAULT AND BATTERY: *Breach of the peace — Former conviction — Statute construed.*

On an indictment for an assault and battery, the respondent pleaded that he had been tried, convicted and fined for a breach of the peace, and that said conviction was for the identical facts charged in the indictment. On appeal from an order dismissing the indictment, the facts alleged in the plea being admitted to be true, it was *held*, that the plea was good, and the former conviction a bar to the prosecution of the indictment.

A statute which punishes the inflicting of wounds by shooting or by cutting, thrusting or stabbing with a knife, dirk, sword or other deadly weapon, does not embrace striking and wounding with a pair of blacksmith tongs, and an indictment charging the latter was *held* to charge a simple assault and battery only.

CORER, J. The indictment in this case charged that the appellee "did, in sudden heat and passion, without previous malice, and not in self-defense, *strike* and wound George Gregory with a pair of blacksmith tongs, which said tongs was then and there a deadly weapon."

The appellee, in a plea of former conviction, alleged that he had been arrested and tried and convicted before a justice for a breach of the peace, committed by fighting with George Gregory, and had paid the fine assessed against him, and that said conviction was for the identical acts charged in the indictment.

A demurrer to the plea having been overruled, the commonwealth confessed the facts stated therein, and the indictment was

dismissed, and this appeal is prosecuted to obtain a reversal of that judgment.

The indictment does not state facts constituting an offense within section 1, article 17, chapter 29 of the General Statutes. That section only applies to wounds inflicted by shooting, or by *cutting, thrusting or stabbing* with a knife, dirk, sword, or other deadly weapon, and does not embrace a *wounding* such as is charged in this case.

The indictment was therefore good only as an indictment for an assault and battery, and the question is, whether a conviction for a breach of the peace is a bar to a subsequent prosecution for an assault and battery constituting a part of the transaction.

This question came before this court in 1837, in *The Commonwealth v. Miller*, 5 Dana, 370. and it was then held, though not without some hesitation, that conviction for a breach of the peace, unless obtained by the fraud or collusion of the party pleading, was a bar to an indictment for an assault and battery committed in the breach of the peace for which the defendant had been fined.

Since that time the subject has been repeatedly passed upon by courts of last resort, both in this country and England, and we think the decided weight of authority is in accord with the former decision of this court.

The breach of the peace for which the appellee was tried is a distinct offense from that of assault and battery for which he was indicted, but was embraced in the latter because there can not be an assault and battery without a breach of the peace.

The breach of the peace being included in the assault and battery, it is impossible that the appellee should be convicted of assault and battery without being also convicted of the breach of the peace; and thus, as he has already been found guilty of a breach of the peace, he would be in jeopardy a second time for the same offense—*i. e.*, for breach of the peace—and if convicted and punished, he would be twice punished for one offense, which is repugnant to both the common law and our own written constitution. 1 Bish. Cr. Law, sec. 683.

Judgment affirmed.

PAULK vs. STATE.

(52 Ala., 427.)

BASTARDY: *Imprisonment for debt — Evidence.*

Bastardy is a penal proceeding, and has some of the characteristics of a civil action and some of a criminal prosecution. Imprisonment of the putative father for non-compliance with a judgment in a bastardy proceeding does not infringe the constitutional provision against imprisonment for debt.

In a bastardy proceeding, it seems that it is proper to show on behalf of the defendant that the child resembles a third person, who has had opportunity for illicit intercourse with the mother.

In a bastardy proceeding, evidence to show that the bastard resembled the children of a man who had been seen with the prosecutrix is inadmissible, being too remote and unsatisfactory.

APPEAL from the Circuit Court of *Randolph*.

Tried before Hon. JOHN HENDERSON.

This was a proceeding against appellant under the statutes for bastardy. On the issue before the circuit court as to the paternity of the child, the mother testified that appellant was its father. The defendant then introduced a witness who testified that he "had seen one Clark Messmer with the prosecutrix on two occasions since the commencement of the prosecution, and that both times they were going in the direction of the court house;" that he had seen the bastard child and "*that it favored Clark Messmer's children.*"

To the italicised portion of this testimony the state objected, and the court thereupon excluded it from the jury.

The jury having found the issue against defendant, and he being unable to give bond, the court sentenced him to jail, as the statute requires. The defendant denying the power of the court under the constitution, to make such order, objected and excepted to the sentence.

William H. Smith, for appellant:

I. Under the constitution there can be no imprisonment for debt. None of our laws make bastardy a crime. The proceedings authorized by the statute are not criminal. The governor cannot pardon the defendant. If the parties marry, or the child dies, the proceeding abates. It is a mere proceeding, then, to enforce the performance of a civil duty in behalf of a particular individual; in other words, a debt. No statute makes it a criminal offense to refuse to give the bond. The case against defend-

ant is not required to be made out beyond a "reasonable doubt." Everything shows that it is a mere civil proceeding.

II. Proof to show the probability of another guilty agent is always admissible. The evidence, however weak, cannot be excluded if it has a tendency to prove the issue. Brickell's Digest, 809, § 82. That the proof offered was admissible on an issue of paternity, see Lord Mansfield in *Douglass Case*, Wills on Circumstantial Evidence.

John W. A. Sanford, Attorney General, *contra*.

BRICKELL, C. J. A proceeding under the statute to compel a putative father to the support and education of a bastard child, during the helplessness of mere infancy, has some of the characteristics of a civil action and of a criminal prosecution. It is commenced by a complaint on oath, on which a warrant of arrest issues in the name of the state. A preliminary examination is had before a justice of the peace of the county in which the woman is pregnant or delivered of the child, and if sufficient evidence appears, the accused is recognized to appear at the next term of the circuit court. If he fails to enter into the recognizance with sufficient sureties, he is held in custody. Entering into the recognizance and failing to appear in obedience to it, a forfeiture is incurred, and a writ of arrest issues against him, as in criminal cases on indictment. On his appearance in the circuit court, an issue is made up to which he and the state are the parties, to ascertain whether he is the real father of the child. If this issue is found against him, judgment is rendered against him for the costs, and he is required to give bond and security payable to the state, conditioned for the payment annually, for the period of ten years, of such sums not exceeding fifty dollars a year, as the court may prescribe, for the support and education of the child. Failing to give the bond, the court renders a judgment against him of necessity, in the name of the state, for such sum as at legal interest will produce the sum he is required to pay yearly, and "he must also be sentenced to imprisonment for one year, unless in the mean time he execute the bond required, or pay the judgment and costs." R. C., §§ 4396-4406. The proceeding is certainly penal in its character, if not strictly criminal. On the trial in the circuit, the accuser and the accused are alike competent witnesses. It can be commenced only on

the complaint of the mother. No indictment or presentment by a grand jury is necessary to support it. It abates on the death of the child, and the marriage of the mother and putative father vacates the proceeding, though it has progressed to final judgment. It is a penal proceeding intended to relieve the state from the duty of maintaining the illegitimate child, rather than to inflict punishment for the violation of law. It is founded on the hypothesis that it is a duty due to society from the putative father to maintain and educate his illegitimate child, and the purpose is to compel performance of this duty. *Judge of County Court v. Kerr*, 17 Ala., 328; *Salterwhite v. State*, 28 id., 65.

The constitutional inhibition of imprisonment for debt is not infringed by the imprisonment of the putative father if he fails to execute the bond required of him on conviction. He is imprisoned not for the failure to pay a debt, but for his failure to perform a duty — a duty enforced in the name of the state, for the protection of the state.

On an issue formed in a bastardy proceeding, it is doubtless competent for the defendant to prove that the child bears no likeness or resemblance to him, or that it resembles some other person, who had opportunities of illicit intercourse with the mother. This was not the kind of evidence offered by the appellant. The proposition was to permit a witness to state the bastard child favored the children of another man. It was not proposed to show these children favored their father. A child often resembles only his mother, and has none of the distinguishing features or physical peculiarities of the father. Nor was it offered to show what were the particulars in which the bastard resembled or favored the children of the person named. It was the mere opinion of the witness that the children did bear a resemblance. There is nothing about which the opinions of individuals differ so widely as personal likeness or resemblance. One discovers it, where another, instead of finding traces of it, finds distinctive marks of opposition. The evidence was too vague and uncertain, too inconclusive in its nature, to have gone to the jury. It could not have exerted any legitimate influence on the verdict they were required to render. In the case of *Commonwealth v. Webster* (5 Cush., 302), it was material for the defendant to show that the person he was charged to have slain was in life after a particular hour of a certain day. Witnesses

were introduced who testified that they saw him in various places in Boston, after that hour. To rebut this evidence, it was proposed to show there was a person about the streets of Boston, at that time, who bore a strong resemblance to the deceased in form, gait, and manner, and had, by persons acquainted with the deceased, been approached and spoken to, for the deceased. The evidence was rejected as too remote and unsatisfactory, and was properly rejected.

The judgment is affirmed.

PEOPLE vs. CHRISTMAN.

(66 Ill., 162.)

BASTARDY: *Degree of proof—Judgment.*

Bastardy, though in form criminal, is in effect a civil proceeding and a preponderance of evidence is sufficient to justify a conviction.

A judgment for the payment of several instalments of money and the costs of prosecution and that the defendant "execute a proper and sufficient bond for the payment of the judgment herein in due form of law" is held not open to the objection that it requires the defendant to give a bond for the payment of the costs.

SHELDON, J. This was a prosecution on a charge of bastardy, where a verdict and judgment were rendered against the defendant, from which he has appealed.

It is urged that the verdict was against the evidence. After a careful examination of the testimony, we find that it sustains the verdict, and that there is no sufficient ground for disturbing the finding of the jury upon the evidence.

We perceive no error in the instructions. It is objected to the first one, that it tells the jury they may convict on a preponderance of evidence. It has often been held by this court that the proceeding in question, though in form criminal, is, in effect, a civil proceeding, and that it is not essential to a conviction that the evidence of guilt should exclude every reasonable doubt, but that a preponderance of proof will be sufficient. *Mann v. The People*, 35 Ill., 467; *Maloney v. The People*, 38 id., 62; *Allison v. The People*, 45 id., 37.

It is objected to the form of the judgment, that it requires the defendant to give a bond for the payment of the instalments for

the support of the child. The defendant is adjudged to pay the several instalments of money and the costs of the prosecution, and to "execute a proper and sufficient bond for the payment of the judgment herein in due form of law."

The statute only requires the bond to be given for the payment of the instalments of money adjudged to be paid, and we do not think the judgment should be construed as requiring anything more than the statute does, in this respect. We consider, then, that under the judgment, the defendant is only required to give bond for the instalments, and not for the costs of suit.

The judgment must be affirmed.

Judgment affirmed.

McCoy vs. PEOPLE.

(65 Ill., 439.)

BASTARDY: *Sufficiency of evidence.*

On a charge of bastardy which is supported only by the uncorroborated testimony of the prosecutrix, she being contradicted by three unimpeached witnesses, as to her having had sexual intercourse with others besides the defendant about the time the child was begotten, and it appearing that she had previously charged the paternity of the child on another man, the evidence is held too unsatisfactory to fix the paternity of the child on the defendant.

SHELDON, J. The proof of the charge of bastardy made in this case rests upon the unsupported testimony of the complainant.

She testified that she gave birth to the child on the 15th day of August, 1871; that it was the result of a single act of illicit intercourse between herself and the defendant, in the middle or latter part of November, 1870, and that that was the only instance of such intercourse she ever had with the defendant or any other person.

On the part of the defense, the defendant, by his own testimony, denied the charge in all its parts.

Another witness testified that he himself had sexual intercourse with the complainant as often as once, and sometimes twice, a week, during the months of October and November, 1870, and that during her pregnancy she informed him of her condition, and inquired of him what he was going to do about it. Two other witnesses testify to having surprised the complainant and

still another person in the direct act of sexual intercourse, in October or November, 1870.

The complainant had informed her own father that the father of the child lived at Shannon, in another county, that of Carroll; in consequence of which, her father went there to see the person on the subject. The defendant never lived at that place, as the complainant herself testified. This was a circumstance affecting the credibility of her testimony.

The witnesses on the part of the defendant were in no way attempted to be impeached, save that, as to two of them, it was relied upon as detracting from their credibility, that, previous to the making of the complaint in this case, they had made voluntary affidavits, before a justice of the peace, of the facts which they testified to on the trial.

In view of the whole testimony, a majority of the court regard it as too unsatisfactory to fix the paternity of the child upon the defendant, and the court below should have set aside the verdict as being clearly against the weight of evidence, and have granted a new trial.

The judgment is reversed and the cause remanded.

Judgment reversed.

PEOPLE *vs.* BROWN.

(34 Mich., 339.)

BIGAMY: *Void second marriage — Marriage of negro and white woman.*

It is no defense to a charge of bigamy that the second marriage was one between a negro and a white woman, which is prohibited and made void by statute; for every bigamous marriage is void.

BIGAMY: *Gist of the offense — Two elements of illegality.*

It is the entering into the void marriage while a prior valid marriage exists, that constitutes the gist of the offense; and it cannot help matters any that there are two elements of illegality in the case, instead of one. It is no valid reason for relieving a person from the consequences of violating one statute, that the act of doing so violated also another.

EXCEPTIONS from Recorder's Court of Detroit.

Submitted on brief June 13. Decided June 20.

A. J. Smith, Attorney-General, for the People, argued that a bigamous marriage is always void; that no man can lawfully marry when he is already married; that the gist of the offense is

the going through the ceremony of marriage and living with the woman as if married when the party is already lawfully married; that the violation of two statutes does not relieve from liability under either; that two wrongs do not make a right; that even where the second marriage is incestuous, the offender is nevertheless liable for bigamy. Bishop on Stat. Cr., § 590-2, and note; *Ree v. Benson*, 5 C. & P., 412; *Reg. v. Brown*, 1 C. & K., 144; *Hayes v. People*, 5 Parker, 325; Roscoe Cr. Ev., 309-10; 2 Bishop Cr. L., § 1025.

James H. Garlock, for respondent, to the point that to sustain a conviction for bigamy, the second marriage must have been such a one as would have been in all respects legal and valid, except for the fact that the defendant then had a former wife living, cited: 3 Greenl. Ev., § 205; Bishop on Stat. Cr., § 592; *Reg. v. Fanning*, 17 Irish C. L., 289; 10 Cox C. C., 411; *Burt v. Burt*, 2 Swaley & Tristram, 88; *Carmichael v. State*, 12 Ohio St., 554; *Hayes v. People*, 25 N. Y., 398; *Reg. v. Miller*, 10 Cl. & F., 689.

COOLEY, C. J. The defendant seeks to avoid the penalties of a bigamous marriage by showing that he is a negro, and that the other party to the marriage was a white woman, with whom, under the statute, it was impossible for him to contract marriage at all. Comp. L., § 4724. The argument is, that if the ceremony of marriage has taken place between parties who, if single, would be incapable of contracting marriage, the marriage ceremony is merely idle and void, and the respondent cannot be said to have been married the second time at all.

The logic of the argument is not very obvious. It certainly cannot be based upon any idea that there must be something of binding and obligatory force in the second marriage; for every bigamous marriage is void, and it is the entering into the void marriage while a valid marriage exists that the statute punishes. Nor can we understand of what importance it can be that there are two elements of illegality in the case instead of one, or why the party should be relieved from the consequences of violating one statute because the act of doing so was a violation of another also.

The authorities sanction no such doctrine. There are loose statements in some of the cases, that the second marriage must

have been one that, but for the existence of the first, would have been valid; but these evidently relate to the acts and intent of the parties, and not to the legal ability to unite in a valid relation. It was decided in *Roe v. Benson*, 5 O. & P., 412, that bigamy was committed in marrying a woman under an assumed name, though by law such a marriage between persons capable of contracting would be void. The case of *Regina v. Brown*, 1 C. & K., 144, was similar to the present in its facts, and Lord Denman in summing up said: "It is the appearing to contract a second marriage, and the going through the ceremony, which constitutes the crime of bigamy, otherwise it never could exist in ordinary cases, as a previous marriage always renders null and void a marriage that is celebrated afterwards by either of the parties during the life time of the other. Whether, therefore, the marriage of the two prisoners was or was not in itself prohibited, and therefore null and void, does not signify, for the woman, having a husband then alive, has committed the crime of bigamy, by doing all that in her lay by entering into marriage with another man." These cases are recognized in the case of *Hayes v. People*, 25 N. Y., 390, which is relied upon by the respondent, but which affords no countenance for his exceptions.

The recorder's court must be advised that we find no error in the record, and that judgment should be pronounced on the verdict.

The other justices concurred.

COMMONWEALTH vs. JACKSON.

(11 Bush (Ky.), 679.)

BIGAMY: *Evidence of marriage.*

In a prosecution for bigamy, evidence of the declarations of the respondent that a certain woman was his wife, and of the fact that he had lived with, recognized, introduced and represented her as his wife, is sufficient evidence of a marriage to submit to the jury.

In a prosecution for bigamy, the first marriage may be proved by the admission of the respondent, in connection with recognition and cohabitation, but these are only facts tending to show an actual marriage, which must be found as a fact by the jury.

CORR, J. The appellee was indicted in the Lewis circuit

court for the crime of bigamy, and was tried by a jury, and under a peremptory instruction of the court, was found not guilty, and the attorney general prosecuted this appeal under section 331 of the Criminal Code, in order to obtain the opinion of this court upon the point decided adversely to the commonwealth by the circuit court.

The only evidence of a marriage of the appellee prior to that alleged to be polygamous, consisted of evidence of his declarations that another woman was his wife, and of the fact that he had lived with, introduced and represented her as his wife.

One witness testified that the appellee came to Maysville as early as September, 1874, and engaged to sell sewing machines for him; that he then said he was a married man, and that his wife was in Higginsport, in the state of Ohio; that he (witness) subsequently let the appellee have money with which he said he wanted to bring his wife from Higginsport to Maysville; that he brought a lady to Maysville, whom he introduced to witness as his wife, and boarded with her in a respectable family; that the lady gave birth to a child while in Maysville, and that the appellee told him it was his child, and that his wife had given birth to another child, which had died in Ohio, the funeral expenses of which the witness paid at appellee's request.

Another witness testified that two or three weeks before the alleged second marriage, the appellee applied to him for a horse and buggy to take his wife to the railroad depot, saying she was going to Louisville; and a third witness swore that appellee lived with the woman that came from Higginsport, and claimed that she was his wife.

The circuit judge seems to have been of the opinion that an indictment for bigamy could not be maintained without proof of the fact of two marriages, either by record evidence or by the testimony of one or more witnesses who were present at the solemnization of the marriage rites; or, in other words, that the declarations and conduct of the defendant admitting his marriage, and living with and recognizing the woman as his wife, were not sufficient to warrant the jury in finding a verdict against him.

This is a subject about which there is irreconcilable conflict in the authorities. In Massachusetts, New York, and Connecticut, and perhaps in some other states, it has been held that in prosecutions for bigamy, an actual marriage of the prisoner must be

proven, and that neither cohabitation, reputation, nor the confessions of the prisoner are admissible for that purpose, or if admissible, are not of themselves sufficient to warrant conviction. *The Commonwealth v. Littlejohn* and *Barbarick*, 15 Mass., 163; *Boswell's Case*, 6 Conn., 446; *The People v. Humphrey*, 7 Johns., 314. On the other hand it has been held in South Carolina, Virginia, Georgia, Alabama, Ohio, Pennsylvania, Maine, and Illinois, that in prosecutions for bigamy the confessions of the prisoner deliberately made are admissible as evidence to prove marriage in fact, and in some of those states, that such confessions are of themselves sufficient to authorize the jury to convict. *Britton's Case*, 4 McCord, 256; *The State v. Hilton*, 3 Richardson, 434; *Warner v. The Commonwealth*, 2 Virginia Cases, 92; *Cook v. The State*, 11 Ga., 53; *Cameron & Cook v. The State*, 14 Ala., 546; *Wolverton v. The State*, 16 Ohio, 173; *Murtagh's Case*, 1 Ashmead, 272; *Forney v. Hurlacher*, 8 Serg. and Rawle, 159; *Cayford's Case*, 7 Greenl., 57; *Harris' Case*, 2 Fairf. (11 Me.), 392; *State v. Hodgkins*, 11 Me., 155; *Jackson v. The People*, 2 Scam., 231.

These were not all prosecutions for bigamy, but they were all cases in which the prosecution could only be made out by proof of a marriage in fact, and the same principle which would admit evidence of the admissions, confessions, or conduct of the prisoner in such of them as were not for bigamy, would also authorize its admission in prosecutions for that crime.

The American cases in which it has been held that evidence of such declarations, confessions, and conduct is not admissible, or, if admissible, is not of itself sufficient to warrant conviction, seem to rest on the authority of *Morris v. Miller*, Burr, 2056, and *Birt v. Barlow*, Douglas, 171.

These were actions for *crim. con.*, in which the plaintiffs attempted to establish their marriages by giving in evidence their own declarations, and proving their recognition of, and cohabitation with, the women alleged to be their wives.

In the former case, Lord Mansfield said: "There must be evidence of a marriage in fact; acknowledgment, *i. e.*, acknowledgment of the husband by the wife; cohabitation, and reputation are not sufficient in *this action*." And he gives his reasons for so holding. "It shall not depend," said he, "upon the mere reputation of a marriage which arises from the conduct or de-

clarations of the *plaintiff himself*." Again he says: "No inconvenience can possibly arise from this determination. But inconvenience might arise from a contrary decision which might render persons liable to actions founded on evidence made by the persons themselves who should bring the actions." And twelve years later, in deciding the case of *Birt v. Barlow*, he gave the same reasons for a like decision.

And this additional reason seems to us to be entitled to considerable weight in support of the rule announced by Lord Mansfield in those cases, and by this court in the case of *Kibby v. Rucker*, 1 A. K. Marsh., 290, as applicable to actions for *crim. con.* In such cases the plaintiff knows when, where, and by whom he was married, and at least some of the persons who were witnesses of the fact, and generally has it in his power to offer direct and positive proof. But the case is often quite otherwise with the government in prosecutions for bigamy. The prosecuting officer must often be wholly ignorant of the time and place of the prisoner's first marriage, of the names and residence of those present at its consummation, and the avenues of information will generally be closed to him, especially when the first marriage took place, as it is generally the case with bigamists, in some other state or country. Another difficulty in the way of the government under the rule that the first marriage must be established by record evidence, or by the testimony of one or more witnesses present at the marriage, and which does not exist in actions for *crim. con.*, is, that the government cannot read the depositions of witnesses, and may be unable to procure the attendance of those residing out of the state, while the plaintiff in *crim. con.* may procure and read depositions to prove the fact of his marriage.

But Lord Mansfield did not say in *Morris v. Miller*, as some have supposed, that a prisoner's words and conduct could not be given in evidence against him to prove, in a prosecution for bigamy, the fact of his having been previously married, or that such evidence would not of itself authorize a conviction. He said, it is true, that "in a prosecution for bigamy, a marriage in fact must be proved;" and this we do not for a moment doubt is now and has always been the law; but Lord Mansfield goes on to say: "We do not at present define what may or may not be evidence of a marriage in fact," and thus left open the very

question which he has been quoted as deciding, which, as already stated, seems to be the foundation upon which the American cases rest, which hold that direct and positive proof is required. That Lord Mansfield did not mean to decide that a marriage in fact could not be proved by evidence of the declarations and conduct of the prisoner is not only clear from the case in which he has been supposed to have made that decision, but is further shown by his decision in *Mary Norwood's Case*, (1 East's Cr. Law, 337), where he, with the concurrence of Lord Chief Justice Parker, and Justices Smythe, Bathurst and Parrot, determined that seven years' cohabitation and several admissions by the prisoner that a person was her husband, by calling him by that appellation, was not only competent, but sufficient evidence to prove a marriage in fact.

Mr. Phillips in his work on Evidence (vol. 2, pp. 210-12), in commenting on the case of *Morris v. Miller*, says: "This decision does not warrant the conclusion that a distinct and full acknowledgment made by the defendant himself will not be evidence of the fact as against him, and sufficient to dispense with more formal and strict proof."

In *Truman's Case*, 1 East, 470, it was decided that his conviction of bigamy obtained upon his confession of marriage was proper.

In *Cook v. The State*, Justice Nesbit, in delivering the opinion of the supreme court of Georgia, said: "Acknowledgments, cohabitation, repute, etc., in ordinary civil cases, prove marriage; but it is said in criminal cases, as in prosecutions for bigamy and adultery, a marriage in fact must be proved, . . . and that the admissions of the defendant are not competent. As a general rule, the confessions of a party, freely and solemnly made, are the highest evidence. So reasonable and well settled is this rule that the exceptions to it, to be sustained, ought to rest upon the most unassailable ground." And again he says it can not be presumed that the prisoner made confessions contrary to the truth, in order to shield himself from prosecution for adultery, upon the assumption that he was, in fact, living in a state of adultery. "Such assumption a court has no right to make;" and we may add that, a request coming from one charged with bigamy, that the court shall assume, in order to acquit him of one crime, that he is guilty of another, and has likewise imposed

a kept mistress upon society as his wife by falsely representing and introducing her as such, is not entitled to be received with any favor.

Mr. Justice White, in delivering the opinion of the supreme court of Virginia, in *Werner v. The Commonwealth*, said: "In all criminal prosecutions as well as civil actions, the confessions of a party, his admissions, and acts amounting to confessions or admissions, are not only admissible, but often the strongest evidence against him, and not unfrequently supply the place of evidence of a higher character which would otherwise be called for;" and this is equally true in a prosecution for bigamy as in every other case. Why should it not be? Is there anything in that crime or in its punishment which ought to give to it a distinct code of the law of evidence, or to give to those accused of it privileges not extended to those accused of other crimes?

Mr. Greenleaf says (2 Greenl. on Ev., sec. 49): "Any recognition of a person standing in a given relation to others is *prima facie* evidence against the person making such recognition that such relation exists; and if the defendant has seriously and solemnly admitted the marriages, it will be received as sufficient proof of the fact." If a defendant indicted for adultery can be convicted upon evidence of his admission that the woman with whom the crime was committed was the wife of another, without any other evidence of a marriage in fact, *a fortiori*, one indicted for bigamy may be convicted on his deliberate admission of his own marriage, or that the alleged wife was such in fact, when that admission is coupled with evidence of recognition, cohabitation, and provision for her as a wife, and acknowledgment that he is the father of her children.

Again, Mr. Greenleaf says, the marriage of one indicted for bigamy may be proved "by the deliberate admission of the prisoner himself." (Greenl. Ev., vol. 3, sec. 204.)

Mr. Chitty, in a note to the title "Indictments for Bigamy or Polygamy," says: "Any evidence seems to be sufficient which will convince the jury that an actual marriage was completed." (Chit. Crim. Law, 472.)

In *Regina v. Upton* (1 Car. & Kir., 165) it was held that on indictment for bigamy or adultery, the prisoner's deliberate declaration that he was married to the alleged wife was sufficient evidence of marriage.

From this notice of English and American authorities it seems to us that neither the common law of England, as adopted in this country, nor the American common law, as recognized by the courts of the various states, requires us to hold one charged with the crime of bigamy can not be convicted upon clear and satisfactory proof of his declarations that the alleged wife is legally such, when those declarations are coupled with evidence of cohabitation with her, and her introduction by him into a community where he resides, as his wife. We think the safety, the happiness, and the honor of families, the good order of society, the preservation of the public morals, and a due regard to public decency and individual virtue, demand that the rules of the law should furnish every facility for the punishment of crimes which a proper regard for the security of the innocent will allow.

It is difficult to perceive any reason for discriminating between admissions to prove a marriage and other facts essential to constitute the legal guilt of the accused; there can be no more danger of doing injustice in receiving such evidence in the class of cases under consideration than in any other. Where the declarations of the prisoner, and the fact that he has cohabited with the woman alleged to be his wife are alone relied upon, the jury should still be told that this is only evidence tending to prove an actual marriage, and that it is for them to decide whether the facts proven are sufficient to warrant them in finding the prisoner was in fact married to the alleged wife, and unless they so believe they should acquit, although they may believe he recognized and cohabited with her as his wife. This will place the declarations of one indicted for a crime in which the proof of actual marriage is necessary to make out his guilt upon the same legal footing with those charged with other crimes, and will not give comparative immunity to this detestable crime by obstructing the path of the prosecutor with a rule of evidence which it is believed would render conviction impossible in a large majority of such cases where the moral evidence of guilt is conclusive, and where a conviction could be had by simply applying to that class of cases the same rules of evidence applied to other crimes, subjecting the offender to like punishment.

We are therefore of the opinion that the court erred in giving to the jury a peremptory instruction to find the appellee not guilty.

McDADE vs. PEOPLE.

(29 Mich., 50.)

BURNING: *Statute construed.*

In a statute which provides that "every person who shall set fire to any building, * * or to any other material with intent to cause any building to be burned, or shall, *by any other means*, attempt to cause any building to be burned," the words "by any other means" must be construed to mean by any other means of a like nature; and an attempt to cause a building to be burned by soliciting a third person to set fire to it, and furnishing him with the materials, is not within the statute.

COOLEY, J., *dissenting*

ERROR to Alpena Circuit.

Atkinson & Hawley, for plaintiff in error.*Byron D. Ball*, Attorney General, for the people.

GRAVES, C. J. This is a writ of error to the circuit court for the county of Alpena. The plaintiff in error was convicted and sentenced to the state prison upon the following charge, as embodied in the second count of the information filed against him by the prosecuting attorney:

"And said prosecuting attorney further gives said court to understand and be informed that heretofore, to wit, on the first day of May, in the year of our Lord one thousand eight hundred and seventy-two, at the city of Alpena, in said county, Patrick McDade did wilfully, feloniously and maliciously solicit and invite one Patrick Blaney, unlawfully and feloniously to set fire to and burn a certain building, to wit, the warehouse there situate of Lorenzo M. Mason, Charles E. Mason and Benjamin F. Luce, and did then and there, for the purpose aforesaid, furnish said Blaney with a large quantity of oil, to wit, one pint, and a large quantity of matches, to wit, ten matches, towards the commission of said offense, whereby and by means of the premises, the said Patrick McDade did attempt to cause said building to be burned, contrary to the statute in such case made and provided."

It was claimed in the court below, and is now insisted upon here, that the facts set forth in this court do not constitute in law an indictable offense. The charge in the information was framed under § 7557, Comp. L., which reads as follows:

"Every person who shall set fire to any building mentioned in the preceding sections" (and a warehouse is such building), "or to any other material, with intent to cause any such building to be burned, or shall by any other means attempt to cause any building to be burned, shall be punished by imprisonment in the state prison not more than fifteen years, or by fine not exceeding one thousand dollars and imprisonment in the county jail not more than one year."

On returning to the information, it will be observed that the count on which the conviction was had contains no averment that Blaney, the person alleged to have been solicited to commit the act of setting fire, took any step towards the execution of that act, or did any act whatever which might inculcate the plaintiff in error as accessory.

The charge in the information is made to rest entirely at last upon McDade's conduct in soliciting Blaney to burn the warehouse. The additional circumstance introduced, that he also furnished oil and matches, is not such an one as can be considered an essential ingredient of the substantive offense intended to be set forth. The addition of this fact in no manner helps to fill up the measure required by the statute, and the charge would be as valid without it as with it. If the provision relied on will support such a charge as that actually made, it would equally well support one based on the solicitation, and not attended by the incidents introduced as to the furnishing of oil and matches.

The question, then, is, whether this law will warrant a charge based on solicitation. It is a well settled general rule, and one especially applicable in the interpretation of statutes which define crimes and regulate their punishment, that general words are to be restrained to the matter with which the act is dealing, and that if it be dealing with specific things or particular modes only, the general words must be limited to such things or modes, except when it is apparent that the legislature intended by the general words to go further. *American Transportation Company v. Moore*, 5 Mich., 368; *Hawkins v. The Great Western R'y Co.*, 17 id., 578; *Matter of the Ticknor Estate*, 13 id., 44; *Phillips v. Poland*, L. R., 1 C. P., 204; *Hall v. The State*, 20 Ohio, 7; *Daggett v. The State*, 4 Conn., 60; *Chegaray v. The Mayor*, 3 Kerr, 220; 1 Bishop Cr. L., sec. 149; *Dwarris*, 621.

This rule is now invoked to show that the statute, in prescrib-

ing what should constitute an indictable attempt to cause a building to be burned, contemplated the employment of some physical means, and not merely the soliciting of a third person to set the fire. The counsel for the plaintiff in error argues that the previous members of the section deal with the physical act of firing the building itself or of firing some other material with the intent that the building, as a consequence, shall be burned, and that the succeeding general expression counted on by the prosecution, "or shall by any other means attempt to cause any building to be burnt," must be understood as intending some means of the same nature, some physical act, either personally by the party himself, or through another directed to the end sought.

The attorney general argues that the first and specific portion of the section covers every possible direct and indirect mode of attempt to cause a building to be burnt, excepting an attempt consummated by solicitation, and that therefore, in order to give the general clause in the latter part of the section any meaning and operation, it is indispensable to read it as explicitly applying to the single fact of malicious solicitation to burn.

Without pausing to adduce illustration to impugn this position of the prosecution, touching the scope of the specific provisions, it is sufficient to say that it cannot be maintained that the particular clauses in the first part of the section include every possible mode, other than that consisting of personal solicitation in which a person may set about the burning of a building.

The application of means directly to the building, and the application of means directly to some other material, certainly do not exhaust the physical agencies which are possible in attempts to cause buildings to be burnt. Both branches of the passage preceding the general clause relate, and are confined, to cases where fire is actually set, and it needs no nice reasoning to show that a person may fall short of his object, and employ physical means of the same nature and in the same direction, in attempting to cause the burning. The argument, then, against the position of the plaintiff in error, fails.

Passing this topic, we come to other views which deserve notice.

The specific provisions of the section expressly refer to the kind of buildings mentioned in preceding sections, while the

general clause which follows uses the general expression, "any building," and therefore does not, like the earlier definite clause, distinctly and expressly confine itself to a special and determinate class of buildings. Now we cannot suppose the legislature meant, by this general phrase, to go beyond the objects intended to be protected by the earlier and definite provisions, and make an attempt to cause "any building" to be burnt, whatever its value or character or use, an offense liable to be punished by imprisonment in the state prison for fifteen years. It is very obvious that this expression, "any building," should be limited, and read as agreeing with the specification immediately preceding, namely: "any building mentioned in the preceding sections."

We find, then, that in one respect, at least, this general clause must submit to limitation; and that the legislature must have intended that it should be construed, in so far, at any rate, in subjection to the rule before quoted. In framing this portion of the law, we must accordingly conclude the legislature were not minded to employ terms which, by themselves and apart from precedent matter, were suited to exactly express the sense intended. On the contrary, they were satisfied in using general expressions, which would be liquidated by judicial exposition, according to the established rules of interpretation and construction.

This circumstance is not without its influence, when we are seeking what the legislature expected from judicial consideration. Recurring to the view presented by the attorney general, it will be perceived to have a bearing not as yet noticed. According to his construction of this general clause, it could only apply, and hence was intended only to apply, to an attempt by solicitation. Now the language found in the act is very inappropriate for such a purpose, and it seems scarcely possible to suppose that if the legislature had meant to reach "solicitation," and that only, it would have chosen, in order to effectuate their object, the phrase, "any other means."

The more reasonable conclusion is altogether at variance with the view of the prosecution, and in substantial accordance with that of the plaintiff in error. If the object of the legislature had been as claimed by the prosecution, it would have been manifested in the use of suitable and explicit terms. Such terms were familiar, and a resort to them would not have multiplied

words. In other cases, when procurement or solicitation have been contemplated as the things to be forbidden and made criminal, the legislature have employed terms plainly adapted to denote the purpose, and very different from the expression used in this law. Comp. L., §§ 7772, 7803, 7804.

On the whole, it is deemed to be very clear that in using this phrase, "any other means," the legislature did not have it in mind and did not design to denote and identify a mere invitation to burn; and looking at the enactment in connection with the provisions associated with it, and considering the subject matter and general spirit, and the recognized rule of interpretation already noticed, I think we are under the necessity of holding that this statute was intended to require some physical fact, even in cases marked by express invitation, and cannot be satisfied without some such act committed in person or through another, reaching far enough to amount to the commencement of the causation. *Regina v. Williams*, 1 Den. C. C., 39; *Regina v. Eagleton*, 33 E. L. & E., 540.

The "attempt to cause" must be by some act of the same general nature as the acts before mentioned; that is, some physical act, and sufficiently proximate to the result to be caused, as to stand either as the first or some subsequent step in the actual endeavor to really bring about or accomplish such result. It must amount to something more than a preparation for an attempt to cause. The specific provisions in the fore part of the section require a physical act of causation very near to the effect, and I can discover no ground in the subject or in the arrangement or phraseology for exempting the general clause from the rule of law before stated, by which generals are subordinated by the sense of preceding and connected particulars. If correct in this, it follows that the count on which the conviction was allowed alleged no crime in law, and that the judgment and verdict must be set aside, and the plaintiff in error be discharged from further prosecution on this information.

CAMPBELL, J., concurred.

COOLEY, J. I have not been able to concur in the view taken by my brethren of the statute under which the information was filed. The statutes provide for the punishment of "every person who shall set fire to any building mentioned in the preceding

sections, or to any other material, with intent to cause any such building to be burned, or shall by any other means attempt to cause any building to be burned;" that is to say, it provides for the punishment of every person who shall himself set a fire with the intent specified, or, on the other hand, as I understand it, shall make the same attempt by any other means whatsoever. Instead of discovering in this statute an intent that its operation shall be confined to cases in which the accused party has resorted to physical means to originate the fire himself, it seems to me that the purpose is manifest to make its scope as general as possible, and it cannot be denied that, in this case, if the facts charged in the information are true, the prisoner did resort to means to cause the building to be burned. But even on the view of the statute taken by my brethren, I should think the case within it. Furnishing a confederate with combustibles to begin a fire with, is as much a resort to physical means for the purpose, as would be the planting of a torpedo with one's own hands, with the intent that it shall explode and cause a fire.

CHRISTIANCY, J., did not sit in this case.

DELANEY VS. STATE.

(41 Tex., 601.)

ARSON: *Motion for new trial — Burning jail to escape.*

A prisoner who burns a hole in the floor of the lock-up for the purpose of making his escape through the hole so made is not guilty of arson.

It seems, that if he had set fire to the building intending to burn it up and make his escape in the confusion attendant on the burning of the building, he would be guilty of arson.

Affidavit of co-defendant, against whom there is strong evidence, is not sufficient on a motion for a new trial on the ground of newly discovered evidence.

MIKE DELANEY was tried at the February term, 1874, of the district court of Fannin county, on an indictment charging him, jointly with John Whaley, with the wilful burning of a calaboose used for confining prisoners in the city of Bonham. Late in the evening of the 17th of March, 1874, Delaney and Whaley were arrested for drunkenness, and confined in the calaboose in

See *Jenkins v. State*, 53 Ga., 33, in which it is held that burning of jail to escape is not arson.

Bonham during the following night. Soon after being imprisoned, Delaney, still drunk, swore that he would burn up the town of Bonham before the next Tuesday night. Late in the night of 17th March the cries of defendant were heard calling for water to extinguish fire. A fire had been kindled on the floor with the staves of a bucket, and the floor burned through. Water was handed to defendant through the grates of the prison, with which he extinguished the fire.

No witnesses were introduced for the defense. The judge, after copying in his charge the statutory definition of arson, and informing the jury that a calaboose was a public building, instructed it further, as follows: "On the trial of a criminal action, when the facts have been proved that constitute the offense, it devolves on the accused to establish the facts or circumstances on which he relies to excuse or justify the prohibited act or omission. Drunkenness is no excuse for crime. A man is always presumed to intend the natural consequences of his own act, and if you have a reasonable doubt arising from the evidence that this defendant did not wilfully set fire to the calaboose, or if he did not aid in doing so, you will find him not guilty; but if you believe that he did wilfully set fire to it, or aid in doing so, you will find him guilty as before charged."

Verdict of guilty, and punishment assessed at five years in the penitentiary.

There was a motion for new trial, supported by the affidavit of the co-defendant Whaley, to the effect that the fire was accidentally communicated to the floor from a pipe which one of the prisoners had been smoking. Motion overruled, and defendant appealed.

No briefs for appellant have reached reporters.

George Clark, Attorney General, for the state.

ROBERTS, C. J. We do not think the court erred in admitting the threats of defendant, "that he would burn up the calaboose and town of Bonham before the next Tuesday night," while he was imprisoned. It does not stand on the same ground of confession of having previously committed an offense made after and during his imprisonment. Nor do we think the affidavit of his co-defendant, that the burning was accidental, was a good ground for a new trial, as presented in defendant's motion, because the

facts developed on the trial did not show that there was no evidence against his co-defendant Whaley. It was nearly as strong against one of them as against the other, the threat made by the defendant on the previous evening being the only difference. The only other ground in the motion for a new trial was that the verdict was contrary to the law and evidence. Arson is the wilful burning of a house. The house need not be consumed with fire to constitute the offense. It will be sufficient to show that a person set fire to the house, to the extent that some part of the house was on fire, unless it is made clearly to appear that it was accidental, or was for some other object wholly different from the intention to burn up or consume the house. If, for instance, it appears from the evidence that a person confined in prison set fire to the door to burn off the lock so as to make his escape, or that he burned a hole in the floor or in the wall for the same purpose, it would not be arson. So it has been held by the courts of other states. *The People v. Cotteral et al.*, 18 Johns., 115; *The State v. Mitchell*, 5 Ired., 350.

If, however, a prisoner, or a number of prisoners in concert, should set fire to a jail without such definite purpose, but for the purpose of burning the jail sufficiently to produce the alarm of fire, and in the consequent confusion make an escape, being at the same time indifferent as to whether the jail was consumed or not, that would be arson.

In this case the evidence is circumstantial. There is no direct evidence that both or either of the two prisoners set fire to the calaboose, and the circumstances tended very strongly to show that they were endeavoring to burn a hole in the floor, so as to make their escape through it. The fire must have been burning for some time, perhaps several hours before daylight. It is not reasonable to suppose, considering the trivial importance of their offense, as indicated by their fines next day, after they were put in drunk, that they were desperate enough to intend to burn up the calaboose during the night, with themselves in it. When they gave the alarm of fire, about daylight, they did not act like persons who had set fire to the house to produce general alarm and escape in the confusion. Had that been their design, we should have reasonably expected that they would have waited until the fire had taken greater effect, and then, upon giving alarm, have let others rush into the calaboose to extinguish the

fire, with the hope of there having been a chance to rush out. Instead of that, defendant called for water the first thing, and it being handed to him through the grated window, he put out the fire himself on the inside, and another person, crawling under the calaboose, put it out on the under side of the floor; so that the fire was entirely extinguished, and the prisoners were still in prison, when the marshal of the town came with the key, unlocked the door, went in and examined the premises in reference to the burning. There is not the least intimation on the part of any of the witnesses that they made any effort to escape. The marshal does not even state that he summoned a guard when he took them before the mayor, where they were each fined two dollars and fifty cents and discharged. The whole trial of the case seems to have proceeded upon a view of the law, that if the defendant did wilfully set fire to the calaboose, he was guilty of arson, whatever might have been his intention in doing it. The jury was instructed that: "On the trial of a criminal action, when the facts have been proved which constitute the offense, it devolves on the accused to establish the facts or circumstances on which he relies to excuse or justify the prohibited act or omission." This charge in this shape, though its meaning may be well understood by a lawyer, may sometimes be well calculated to mislead a jury. The facts or circumstances of excuse may have been already shown by the evidence for the prosecution, and then it would not devolve on the defendant to show them. So in this case, all the witnesses that knew anything about the transaction had been examined by the state. The defendant had no means of showing anything more, as he could not put his co-defendant on the stand as a witness. The jury might have been correctly told that it devolved on defendant to show such facts, unless they appeared in the evidence of the prosecution, and then their minds would have been directed to the facts in proof, and not have been left to the possible conclusion that, as the defendant had introduced no evidence on his part, there was none favorable to him before them already for their consideration.

Another objection to this charge in reference to this case is, that it did not indicate to the jury what facts would be an excuse for wilfully setting fire to the calaboose, or, indeed, that there could possibly be any such facts. It is true that it was not incumbent on the court to indicate any such facts, if the evi-

dence did not point to them. For instance, it was not required that the court should have told the jury that if they believed the defendant, upon recovering from his drunken spell, was about to freeze, and built a little fire with the staves and hoops of the bucket on the floor to avoid that calamity, and did not design to burn the building to any dangerous extent, under the reasonable expectation of being able to control the fire, that would excuse him from the criminality of arson because there was no evidence that it was then cold, and no other evidence, tending to establish such a conclusion. But there was evidence tending to show that if the defendant wilfully set fire to the floor at all, it was done to burn a hole through it to make his escape. And the charge should, therefore, have indicated that as a fact, which, if they believed it to be true from the evidence, would be an excuse sufficient to relieve him from the charge of arson.

In reference to the facts in the evidence, all being circumstantial, the matters to be considered in coming to a conclusion were, that the floor of the calaboose was certainly on fire, and a small hole had been burned through it. The staves of the bucket were found partially burned, with the burnt ends towards and near the fire. Some coals were found under the floor, with some chips and shavings near them. There was no water left in the calaboose. The two prisoners had been put in while drunk on the evening previous, most probably only because they were drunk, and one of them noisy.

Under a view of all these circumstances, the questions presenting themselves were (as no one saw the thing done who can give evidence, if anyone did see it), Was the fire accidental, or was it set on purpose? If on purpose, was it done by defendant, or his co-defendant, in the building, or by some one under it? If done by some one in the building, was it done by both or by one, and which one? If defendant was implicated in purposely doing it, was it done to consume the building with fire, or to make a hole to get out, or was it done with a reckless disregard as to whether the building was consumed with fire or not, and for the purpose of producing alarm and confusion to facilitate their escape?

That the burning was done by the defendant, was a material fact to be found by the jury, and which was not to be taken for granted simply from the fact that he could have done it. If they had been satisfied of that fact, beyond a reasonable doubt, from

a consideration of all the evidence, then they might have presumed that it was a wilful burning, if there was not enough evidence to satisfy them that it was not wilful, but was only accidental, or done for the purpose only of making a hole in the floor through which to escape. (As to accidental or negligent burning, see Russ. on Crimes, 549; Whart. Cr. Law, sec. 1663.)

In New York, the statute makes arson the "wilful burning," etc., as in this state.

In North Carolina, the statute makes arson the "wilful and malicious burning," etc., as at common law.

In both of those states it has been held, in well considered cases, that where it appeared reasonably certain, from all the facts and circumstances in evidence, that the purpose of the prisoner in jail in setting fire to it was only and solely to burn the lock off of the door (in one case), or to burn a small hole (in the other case) to enable him to make his escape, it would not be the wilful burning of the house as contemplated by the law of arson. They both also held that if defendant set fire to the house, he would be guilty of arson, unless it did clearly appear that his intention in doing it was only to so burn it (as above stated) as to make his escape. *People v. Cottrell et al.*, 18 Johns., 115; *The State v. Mitchell*, 5 Ired., 350.

Concurring in this view of the law, we are of the opinion that the court failed to charge the law of the case as it was required to be done by facts in evidence, for which error the judgment is reversed and cause remanded.

Reversed and remanded.

MEISTER vs. PEOPLE.*

(31 Mich., 99.)

ARSON: Prosecution by private counsel—Burning insured property—Evidence—Statute construed.

Counsel employed and paid by private parties will not be allowed to prosecute

* The statute on which the information in this case was based, reads as follows: "Every person who shall wilfully burn any building, or any goods, wares, or merchandise, or other chattels, which shall be at the time insured against loss or damage by fire, or shall wilfully cause or procure the same to be burned, with intent to injure the insurer, whether such person be the owner of the property or not, shall be punished by imprisonment in the state prison not more than ten years." 2 Mich. Comp. Laws 1871, sec. 7560.

in a criminal case, against the objection of the respondent, especially where the private party has a pecuniary interest in the conviction of the accused. Preliminary examinations on charges of felony may be conducted by counsel employed and paid by private parties.

In a prosecution for burning insured property with intent to defraud insurers, an actual valid insurance must be proved.

In a prosecution for burning insured property, evidence that a month before the fire the defendant wanted a witness to burn the property is admissible.

Guilty knowledge may be proved by circumstantial evidence, as well as any other fact.

Under a statute punishing those who burn insured property, and those who cause or procure it to be burned, the defendant who is charged with burning the property cannot be convicted on proof that he procured the building to be burned while he himself was absent. Burning and procuring to be burned are different offenses under the statute.

ERROR to Saginaw Circuit.

Guylord & Hanchett, for plaintiff in error.

Wisner & Draper, for the people.

CAMPBELL, J. The respondents below were all tried and convicted of the offense of burning certain insured property, in the city of Saginaw, on the 22d day of June, 1873, with intent to defraud certain insurance companies named in the information. There was no evidence to connect Leizer Meister or William Meister with the burning, as principals present at the fact. The case proceeded throughout on the claim that Rosa Meister, the wife, and Bertha Meister, the sister of William Meister, who occupied the premises, set the property on fire in the absence of the others; and that William and his father Leizer, who lived at some distance off, procured the burning.

At the opening of the trial, an objection was made that counsel had been retained by private prosecutors, and at their expense, to aid in conducting the prosecution. Defendants offered to show this fact, and asked to have one of the assisting counsel sworn, who declined to be sworn, and the court refused to require him; and the prosecuting attorney stating the gentlemen referred to were acting at his request, the court permitted them to assist, and overruled the objection. This question has never been presented to the court before. Under the English practice, prosecutions by private parties have been the rule rather than the exception, and there is no public prosecutor who has general charge of criminal business. The necessity of such an officer

has been urged repeatedly by many of the ablest jurists; and the chief reason suggested has been the abuse of criminal proceedings for private ends, and the subordination of public justice to private control. In this country we have usually had in every state some officer, or class of officers, appointed for the express purpose of managing criminal business; but the extent and nature of their powers and duties have not been uniform. Sometimes the officers have been permanent, and sometimes counsel have been appointed by the courts to act for the term; and the duties have often been left under vague regulations. Under our territorial statutes, and until the Revised Statutes of 1838, the legislation was not very specific. But by the Revised Statutes of 1838, a regulation was introduced that was borrowed from the laws of Massachusetts, and that has been preserved ever since. The prosecuting attorney of each county is required to prosecute all criminal cases in the courts of his county, and may be required also to appear for the same purpose before any magistrate, except in certain municipal courts. And he is expressly debarred from receiving any fee or reward from any private person for any services within his official business, and from being retained, except for the public, in any civil action depending on the same state of facts on which a criminal prosecution shall depend. C. L., §§ 529, 530, 534.

The courts may appoint counsel to act in his place when he is absent or unable to perform his duties, or where the office is vacant; but no other power of appointment is given. Any recognition of other counsel, if valid, can only be by the request of the prosecuting attorney. He cannot abdicate his duties, and the court cannot divide or relieve them, or give to any other counsel any authority whatever, independent of his responsibility. *U. S. v. Morris*, 1 Paine, 209; *Hite v. State*, 9 Yerg., 198; *Com. v. Knapp*, 10 Pick., 477; *Com. v. Williams*, 2 Cush., 582.

The question, therefore, seems to narrow itself to the inquiry, whether or not the persons allowed to act at the request or by the assent of the prosecuting attorney are subject to any restrictions applicable to him, or whether they may act without reference to their relations to private parties.

It has been quite common in this state for prosecuting attorneys to be aided by counsel, and probably in some cases they have had the help of those retained by private prosecutors. As

no objections have been taken in these cases, and no attention has been called to the statute, it cannot be said there has been any practical construction of the statute; and we are obliged to consider the case as one requiring the law to be enforced according to its fair meaning.

The mere appointment of public prosecutors is not inconsistent with private prosecutions, either separately or under official supervision. When the crown officers intervene at common law, they must, as we suppose, have control of the proceedings. The proposals in England to establish a new system, do not aim at entirely destroying the right of private prosecutions. See Edinburgh Review, No. 220, art. 2, on Criminal Procedure in England and Scotland. But so long as the present system exists, it appears to make it not only the right, but the duty of individuals, to complain of felonious crimes; and the disability against bringing private actions before prosecuting for felonies was imposed to encourage such complaints, and to ensure private diligence in bringing offenders to justice. The premiums offered to informers stand on a similar footing.

The policy of allowing *qui tam* actions has not been encouraged in this state, and criminal penalties have been devoted to public purposes. Neither is the felonious character of an injury held to prevent an action before, any more than after criminal prosecution. And one of the reasons given for this is the establishment of public prosecutors. *Hyatt v. Adams*, 16 Mich., 180.

It is impossible to account for the change in our statutes requiring the exclusive control of criminal procedure to be in the hands of public officers who are forbidden to receive pay, or in any way become enlisted in the interests of private parties, unless we assume the law to have been designed to secure impartiality from all persons connected with criminal trials. The law never has prevented, and does not now prevent, private complaints before magistrates, who have a discretion in regard to calling in the prosecuting attorney. In the ordinary course of things, the case for the prosecution is brought out on that examination, and justice requires that it should be, where a defendant does not waive examination. But when the charge is presented on which the respondent is to be tried at the circuit (where he must be tried for all statutory and common law felonies, except petit larceny), the law requires the public prosecutor

to assume and retain exclusive charge of the cause, until the case is ended by acquittal or conviction. The chief dangers which the statute intends to guard against must be those attendant on the trial, inasmuch as the preliminary proceedings usually determine the nature and extent of the accusation, and those may be under the charge of private parties. And we must conclude that the legislature do not consider it proper to allow the course of the prosecuting officer during the trial, to be exposed to the influence of the interests or passions of private prosecutors. His position is one involving a duty of impartiality not altogether unlike that of the judge himself. We have had occasion heretofore to refer to this duty in these officers of justice. Their position is a trying one, but the duty nevertheless exists, and the law has done much to remove hindrances to its performance, and in no case more plainly than by the prohibition in question here, and that against allowing a circuit judge to act as counsel in his own court, before another judge, as was done in *Bashford v. People*, 24 Mich., 245. See, for illustrations, *Wellar v. People*, 30 Mich., 16; *Wagner v. People*, 30 id., 384; *Hurd v. People*, 25 id., 416.

The courts of Massachusetts have passed upon their statute several times. It was first brought to their attention in the case of *Commonwealth v. Knapp*, 10 Pick., 477, where it appeared that Mr. Webster had aided, without objection, in the trial of the principal felon, whose accessories were on trial, and that reliance had been had on his aid in the case at bar, and that he was acting without any pecuniary inducement.

The court, under these circumstances, holding it had a right to allow the prosecuting officer to obtain help in a proper case, considered it admissible in that instance, but reserved their opinion as to any different circumstances, and laid stress upon the absence of any interest in Mr. Webster beyond "a disinterested regard for the public good." In *Commonwealth v. Williams*, 2 Cush., 582, a similar course was sustained, but the court said it could only be allowed for stringent reasons, and referred again to the absence of any pecuniary compensation from any private individual. They said that such counsel is not under ordinary circumstances to be permitted, yet, when sanctioned by the court under the limitations suggested, it would not furnish sufficient ground for setting aside the verdict. In *Commonwealth*

v. Gibbs, 4 Gray, 146, a conviction was set aside because the court had, in the absence of the district attorney, appointed counsel to act in his place, who had been retained by private parties in civil litigation of the same matter. In *Commonwealth v. King*, 8 Gray, 501, a gentleman was allowed to act as counsel who had acted in aid of the prosecution on the preliminary examination, and had also sat upon a commission of inquest concerning the fire, which was the occasion of the prosecution. The court held this peculiar familiarity with the facts would make his help valuable, and no suggestion was made by any one that he was not disinterested, as no interested person, it must be supposed, would have been allowed to sit on the commission.

The supreme court of Maine in *State v. Bartlett*, 55 Me., 200, allowed Gen. Shepley to act with the prosecuting attorney, though under retainer from the insurance company at whose instance the case was prosecuted; and disposed of the Massachusetts cases by saying that in the only one where the conviction was set aside, the counsel complained of was in effect acting district attorney, and so within the words of the statute, which they held should only apply to that officer.

The Massachusetts court, in both of the earlier cases, made the absence of compensation a prominent feature, and in all the cases, spoke of the employment of associates as exceptional, and not generally allowable. They do not bear out the Maine decision in the reasoning. And that can only stand on its own reasoning, upon the assumption that the control of the prosecuting attorney will destroy any influence or mischief which might result from the private interests of his colleagues.

But a theory which holds them as any thing but his deputies, or assistants in office, would render it difficult to reconcile their appearance with the law, which compels him to conduct the prosecution. Such counsel, in the courts of the United States, are required to take the oath of office, and are made expressly public officers. 16 L. U. S., 165. The experience of trials shows that any other position is fallacious. When counsel are introduced into a cause, and aid in the trial or argument, it is little short of absurd to suppose they can be prevented from having their own way. It would be unseemly and unprofitable for one counsel, during a trial, to interfere with his associate's questions or argument; and competent auxiliaries would not be engaged on terms

which would subject them to open slights. We must look at things as they exist, and every one knows that if a prosecuting attorney allows the counsel of private parties to intervene, it must usually be for the reason that they will save him labor, and assume the burden of the prosecution. The mischief which the law aims to avoid is, prosecution by interested parties; and if such is the policy of the law, it ought to be carried out. It does not assume that there is any thing dishonorable in such employment, but it does assume that it is not proper to entrust the administration of criminal justice to any one who will be tempted to use it for private ends, and it assumes that a retainer from private parties tends to this.

The great scandals which have occurred from the abuse of criminal process to further purposes of gain or vindictiveness have often demanded notice; and no better remedy has been suggested than the policy of our statute. It does not prevent any one from hunting up proofs, or furnishing every facility to the officers of the law. But it will be very inefficient, if it is possible to allow those who have a direct pecuniary interest in convicting a prisoner, to take an active part in his trial. Until the legislature see fit to restore the common law rule, and leave cases to private prosecutions, it must be assumed that they regard it as unsafe and opposed to even handed justice.

As the liability of the insurance companies on their policies would be avoided by proof that the property was burned by the assured, the case is one within the statute; and counsel in the interest of the insurers should not have been allowed to appear.

It appeared, on the trial, that the policies of insurance were not completed for delivery at the home office, but were sent, with printed signatures, to George A. Baker, who signed and delivered them as agent. Upon attempting to prove his agency, it appeared that the authority was written, and was not produced, and no proof was given of its contents. But the court allowed evidence of recognition to stand in lieu of proof of agency, and for that purpose testimony was introduced that the blank policies were received from a Chicago firm purporting to be general agents, but whose authority was not proved; that no losses had been paid by any of the companies at that place; that Baker and his partner made remittances, deducting their commissions, and not showing what was received on particular poli-

cies; that reports were sent with lists and particulars of policies monthly, and these were sent to the secretary, who acknowledged them. No evidence was given of the contents of any reports, or of the incorporation or existence of the companies, or that the person corresponding with Baker was secretary. The court held the evidence sufficient to go to the jury.

The statute punishes only the burning of property actually insured; and nothing but a valid insurance plainly established would suffice. And as the whole validity of these insurances depended on the authority of Baker, it was essential to show it. There was here no proof of authority from any one, and no proof of recognition by any one who was shown to be connected with and authorized to act for the alleged insurers. And there was no production of the writings relied on for recognition, nor proof of their genuineness. The case was entirely barren of all proof on the most essential part of the issue, and the court should have so ruled.

The fire was on the 22d day of June. Proof was given, under exceptions, that about a month before the fire three conversations were had between Leizer Meister and John Wagner and John Nugent (at one of which William Meister was present) in which Leizer desired to get them to burn the property between the 1st and 10th of June, between Saturday night and Monday morning, when the folks would be away; and consulted as to the best way of burning. This testimony was objected to, as tending to show another offense, under a different statute.

We think this was admissible as tending to show a purpose to burn the property, existing not very long before the fire; and bearing on the probabilities. The men were convicted on circumstantial testimony, and it was not foreign to the issue to show a previous conspiracy to burn the same property. If the jury believed this testimony, they must have found that the two Meisters desired to have the building destroyed, and this was certainly one of the elements of the crime, if a crime was committed, and one of great importance.

The bill of exceptions states that some weeks before the fire, Wagner and Nugent were arrested for burglary, and continued in jail until after the fire, and were convicted and sent to state's prison, whence they were brought to testify. It further appeared from their cross-examination that they were of infamous character.

In order to corroborate their testimony, the jailer was allowed to swear that, during the week preceding the fire, Nugent told him that parties owning a clothing store on Water street had spoken to him and Wagner about burning it, and the night it was to be burned would be either Saturday or Sunday evening, when they would be in Bay City. He refused to give names. Also that Wagner told him a similar story, adding that the parties owned a house and barn on the Deerfield road, which they had also spoken to him about burning. This last fact was stricken out as immaterial.

This testimony was all objected to, but received.

This was not the statement which these witnesses had made on the stand. According to that, the time of burning was to have been on or about the eighth of June, and subsequent to their arrest. If they had any conversation about a fire to take place on the 22d, it must have been after their arrest, or they must have given a false account under oath concerning the talk with the Meisters. If Nevins is believed, there could be no doubt of the complicity of Wagner and Nugent in the fire; but there can be as little doubt that they made no statement on the stand showing any knowledge in advance of such an event. There is no identity in the stories, and one cannot corroborate the other. The effect of allowing this testimony would be to allow a conviction on the unsworn statements of infamous witnesses, not subject to any cross examination upon it. If a witness can be corroborated at all by his repeated statements implicating third persons, the statements must be the same as far as they go. Upon the abstract proposition, no decision is called for. This testimony was not admissible.

It is also claimed the court erred in refusing to charge that there was no evidence on which the two women could be convicted.

In the view we have taken of the proof of insurance, there was no sufficient evidence. But the point specially aimed at was, that, assuming the insurance proved, there was no proof that the women knew of it, and had an intent to defraud the insurers.

It is admitted that there was competent proof from which the jury were at liberty to find them guilty of the burning. There was no evidence showing any knowledge of the insurance directly. But whether knowledge of a fact exists, is open to

proof by circumstances, like any other matter. If the fact is shown to exist, under circumstances likely to make it known, and persons act as they might be expected to act if they knew it, we are not prepared to hold that inferences of notice may not be drawn.

If, for example, it were shown that property is insured where a family dwell, with store and dwelling united, and it is also shown that the property is intentionally burned, it must be assumed it was not burned without some purpose. A jury might properly infer that a wife would not destroy her own or her husband's property unless by his command, or with a design to injure him or some one else. If no enmity appeared against the husband, a person must be very ignorant who would not suppose it was to conceal some fraud, or to injure some one else. And if it was likely to injure third persons it would usually do so by endangering their neighboring property, or by subjecting them to some liability contingent on the fire, which is generally on an insurance. Juries have a right to judge from the surrounding circumstances, whether parties have acted in accordance with one or another of these motives, or whether they have been ignorant tools of others; and if their conduct is such as to clearly indicate one of these motives, so as to remove all reasonable doubts, the inference is rightly drawn that there was such knowledge as would call out that motive.

We think the facts on this part of the case were properly left to the jury.

But a serious question is presented, whether the men were properly convicted under the information. They are charged with the burning directly, and not as having procured the property to be burned; while the evidence was clear that if they were guilty at all, it was by way of procurement, and that what they did was before the fire, both being absent when it happened. Our statutes having made all persons principals who would at common law have been accessories, the question arises whether this is such a case.

The position of these defendants would have been at common law that of accessories before the fact, if this burning were a common law felony on the part of the women. No one could be a principal without actual presence, near enough to aid if needed, in furthering the crime. The crime of such an acces-

sory differs in time and may differ in venue, from that of the principal; it is not the same act, but is in the nature of a previous conspiracy to procure its commission.

Where a felony is created by statute, it depends somewhat on the terms of the statute, whether it reaches accessories or not. It is necessary, in all cases, that the accessory have the same intent with the principal. 1 Hale, p. 617, 618; Archb. Cr. Pl., 7; Russ. Cr., 35, 36; 1 Bish. C. L., § 666; and unless by virtue of some statutory provision, no one who is indicted as principal can be convicted as accessory, or *vice versa*. When a statute in general terms declares a certain act to be a felony, it will involve the consequent liability of accessories before or after the fact, where there is nothing inconsistent with that consequence. Bishop St. Cr., § 139, 142; 1 Russ. Cr. L., 34, and when a statute in terms punishes not only the principal offender, but those who would by the terms of the statute be described precisely as accessories would be at common law, the persons so described will be treated as accessories. 1 Russ., 31-2.

But a statute will nevertheless be construed by its language, and will not be extended beyond it, and it may be so drawn, and often is, as to be confined in its operation to certain persons, or persons having a certain intent or quality, and where it does this, it is enforced according to its terms.

The section of the statute under which this prosecution is brought includes two distinct offenses. The first is, where any person shall "wilfully burn insured property, with intent to defraud the insurer." The second is, where any one "shall wilfully cause or procure the same to be burned, with intent to injure the insurer." Comp. L., § 7560.

If the second offense were only that of an accessory, the whole section might be regarded as merely reaching the different actors in the same offense, and there could be no great difficulty in determining their position. But the second clause goes further, and punishes all persons who procure the fraudulent burning of insured property, whether the person doing the burning had or had not the design to defraud insurers, whatever else may have been his guilty purpose. This clause is equally applicable to all guilty procurement, whether through guilty principals or through agents who would not be principal offenders. It was evidently designed to prevent the danger of an acquittal of the guiltiest

parties, by reason of a failure to convict those who are merely their tools.

Where the statute has so definitely specified all the persons who could, under any circumstances, be guilty, and has divided them into two distinct classes, it seems to be no more than reasonable to deduce an intention to require each to be charged with his own statutory offense, in the language or substance of the statute, and not to leave it optional with the prosecutor to charge the defendants according to the facts, or against the facts by legal fiction. The danger of it appears on the present record, where it became a serious question whether the plaintiffs in error might not be entitled to an acquittal on account of the want of guilty knowledge of their co-defendants, who in turn may have been exposed to prejudice by being joined with them. If separately informed against according to the parts they are severally charged with having taken in the transaction, the issues will be more fairly presented, and the results more satisfactory.

The judgment must be reversed, and the verdict set aside, and it must be certified to the court below that there should be a new trial, but that the plaintiffs in error cannot be convicted under the information, unless they were present at the burning.

The other justices concurred.

NOTE. —At common law, all criminal prosecutions for offenses against the persons or property of individuals were set on foot and conducted by private persons. Such an one was called the *prosecutor*, and employed and paid his own counsel. By the statute, 21 Hen. VIII., cap. 11, provision was made, by virtue of which the prosecutor on a conviction for larceny obtained restitution of his goods. The statutes, 25 Geo. II., cap. 36, 18 Geo. III., cap. 19, and 7 Geo. III., cap. 64, make provisions for paying the expenses of the prosecutor in conducting *bona fide* criminal prosecutions which seemed to the trial judges meritorious. The design was to encourage private persons to prosecute to a conviction all criminal offenses of which they were the victims. And partly in order to secure this the more effectually, it was held that any private injury which amounted to a felony was merged in the felony, at least until after a criminal prosecution for the felony was had; and until such prosecution had been had, and terminated either in the conviction or acquittal of the offender, no action would lie for the private injury. 4 Black. Com., 362, 363; 1 Hill. on Torts, 60-63. But in the United States it is everywhere the policy to entrust prosecutions for criminal offenses in the higher courts to sworn public prosecutors only, whose duty it is to see that justice is honestly and impartially administered. And it is generally the policy of the law to surround them with such restrictions and safeguards as will prevent their being influenced by any interested or improper motives. The general scope of the duties of a public prosecutor, and of counsel associated with him, is ably discussed by Mr.

Bishop in 1 Bish. Crim. Proceed., sec. 988, *et seq.* It is certainly more conducive to justice, that the counsel in charge of a criminal prosecution should be responsible only to the public, and that he should be in no wise under the influence of private or injured parties, who often seek, under the cover of the criminal law, to extort private redress or gratify personal malice. In accord with our general policy, it is now the better opinion that there is no longer any merger of a private injury in a felony, nor is the private remedy suspended until a criminal prosecution has been had. See 1 Hill, on Torts, ch. II, sec. 8; *Boston v. Dana*, 1 Gray, 83; *Hyatt v. Adams*, 16 Mich., 180.

ISAACS VS. STATE.

(48 Miss., 234.)

CONSPIRACY: *Practice.*

On an indictment for conspiring to defraud, it is not necessary to allege or prove that the fraud was successful. The act of conspiracy is an offense of itself, though the fraud be never consummated.

Where there is a joint verdict and judgment against several, which is erroneous as to one, against whom there was no evidence, the judgment must be reversed as to all. A *nolle prosequi* should have been entered as to the one against whom there was no evidence, or a verdict of acquittal rendered in his favor.

TARBELL, J. N. Isaacs, M. Wolfe, A. Cohen and A. Lewis were jointly indicted in the Warren county circuit court, in 1871, for a conspiracy to cheat and defraud Herman & Moss, and I. Rheinhart, merchants of Vicksburg, of their personal property, viz.: goods, wares and merchandise. After arraignment and plea, there was a motion to quash the indictment on the ground that it "does not allege that the property mentioned was obtained by the prisoners or either of them;" that it "does not state that the property was obtained by prisoners, or any of them, by reason of false pretense, nor is the character of the false pretense stated;" and, that it "is vague and uncertain, and does not state with clearness the ownership of the property." The record does not show a decision of this motion, and presumptively it was waived. As to this indictment, we refer to Wharton's Am. Cr. Law, title, Conspiracy; Wharton's Forms and Precedents, title, Conspiracy, and to Bishop on Cr. Law, vol. 2, Conspiracy, with the remark that it is for the conspiracy, and not for obtaining property. The trial in 1872 resulted in a verdict of guilty against all the defendants. There was a motion for a new trial on the following grounds: Error in giving the instruction for the state, and in

refusing the second instruction for the defendants; the jury disregarded the instructions; the verdict is unsupported by the evidence, and misconduct of the jury during the trial, which motion was overruled. The judgment and sentence of the court was as follows: "It is, therefore, considered by the court, that for the crime of conspiracy of which they stand convicted, they be sentenced to imprisonment in the county jail of Warren county for the term of one day, and each of them be fined \$50, and they pay the costs of this suit." Thereupon, the accused prosecuted a writ of error to this court, and assigned thereon the following causes of error: In giving the instruction for the state; in refusing the second instruction for the accused; in refusing to quash the indictment; in overruling the motion for a new trial; the insufficiency of the indictment, and verdict unsupported by evidence.

The single instruction for the state is drawn with rare accuracy, stating the rule of law and the facts necessary to constitute the crime of conspiracy, and clearly and impartially submits to the jury the question for their consideration.

The instruction for the accused refused by the court was not applicable to the charge of conspiracy, but to a prosecution for obtaining goods by false pretenses. The act of conspiracy is an offense of itself, though the fraud be never consummated. Am. Cr. Law and Bishop Cr. Law, *supra*. Upon all other points the instructions for the accused were full, and considerate of their rights.

Upon an examination of the evidence sent up with the record, we are clearly of opinion that the verdict against Isaacs is wholly unwarranted. Either a *nolle prosequi* should have been entered as to him, or he should have been acquitted by the jury. For this manifest error, the judgment will be reversed. The defendants having been jointly indicted and convicted, the judgment must of necessity be reversed as to all. As to the others, however, the jury would seem to have been authorized to infer a conspiracy from the evidence as to them, though it is not our purpose to express any opinion of their guilt or innocence, or of the weight of the testimony. If truthfully represented, the conduct of Wolfe, Cohen and Lewis was disgraceful. For the verdict against Isaacs, however, the judgment is reversed, and the cause remanded, with a *venire de novo*.

LANDRINGHAM vs. STATE.

(49 Ind., 186.)

CONSPIRACY: *Constitutional law — Indictment.*

It is not necessary to constitute the offense of conspiracy that any act should be done in pursuance of the conspiracy.

A proviso in a criminal statute against conspiracy which reads as follows: "Provided, that in any indictment under this section it shall not be necessary to charge the particular felony which it was the purpose * * to commit," is unconstitutional and void.

An indictment for conspiracy to commit robbery which charges an intent to "forcibly and feloniously take from the person of A. B.," but does not charge that it was to be done "by violence," or "by putting in fear," is insufficient.

BUSKIRK, C. J. The appellant was indicted and convicted under the following statute:

"Sec. 1. Be it enacted by the general assembly of the state of Indiana, that any person or persons who shall unite or combine with any other person or persons for the purpose of committing a felony, or any person or persons who shall knowingly unite with any other person or persons, or body, or association or combination of persons, whose object is the commission of a felony or felonies, shall be guilty of a felony and upon conviction shall be fined in any sum not exceeding five thousand dollars, and be imprisoned in the state prison not less than two nor more than twenty-one years; provided, that in any indictment under this section, it shall not be necessary to charge the particular felony which it was the purpose of such person or persons or the object of each [such] person or persons, or body, association or combination of persons to commit."

The indictment was as follows:

"The grand jurors for the county of Marion, and state of Indiana, upon their oaths present that James Landringham, on the 12th day of November, A. D. 1874, at and in the county of Marion, and state aforesaid, did unlawfully and feloniously unite, combine and conspire with Thomas King, for the purpose of making an assault upon one Thomas J. Barlow, and for the purpose and with the intent then and there of feloniously and forcibly taking from the person of the said Barlow ten United States treasury notes, of the denomination of two dollars each, and of

the value of two dollars each, ten national bank notes of the denomination of ten dollars each and of the value of ten dollars each, twenty United States treasury notes of the denomination of five dollars each and of the value of five dollars each, and twenty national bank notes of the denomination of five dollars each and of the value of five dollars each, all of said notes being the personal goods of said Barlow, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Indiana."

Motions were made and overruled to quash the indictment and in arrest of judgment, and these rulings are assigned for error, and present for our decision the question, whether the indictment is sufficient. If the above quoted act is valid in all of its parts, then it was not necessary to charge, or even to name, the felony intended to be committed; for it is expressly declared in the proviso that it shall not be necessary to charge the particular felony which it was the purpose of such person or persons, or the object of such person or persons, or body, association or combination of persons to commit. We are very clearly of the opinion that the proviso is in conflict with the constitution, and against natural right, and hence is absolutely void. If the indictment need not charge the particular felony intended to be committed, the accused would have no means of knowing, before the trial commenced, what offense he was charged with, and consequently would have no opportunity of preparing for his defense. The question was so fully considered in this court in the case *McLaughlin v. The State*, 45 Ind., 338, that we do not deem it necessary to reargue or restate it.

The proviso being void, it was necessary for the indictment to charge the particular felony which the appellant had conspired, united or combined to commit; and this leads us to inquire whether the indictment does properly charge any particular felony. It obviously would not be sufficient to name the particular felony intended, but the indictment should contain averments sufficient to show what particular felony the accused had united and combined to commit. The averments should be as specific and full as in an indictment charging the commission of such felony. It was evidently the purpose of the draughtsman to charge the appellant with uniting and combining with Thomas King to commit a robbery, but we think such offense is not suf-

ficiently charged. The statute thus defines the crime of robbery: "Every person who shall, forcibly and feloniously, take from the person of another any article of value by violence, or putting in fear, shall be deemed guilty of robbery." 2 G. & H., 442, sec. 18. The indictment should have used the words, "by violence" or "putting in fear." Bicknell Crim. Prac., 319; 2 Arch. Crim. Pr. & Pl., 417, 418; *Scymour v. The State*, 15 Ind., 288.

It is contended by counsel for appellee that the use of the word "forcibly" dispenses with the use of the words "by violence" or "putting in fear." The statute and approved forms use both words, "forcibly," and "by violence."

The court instructed the jury that it was unnecessary for the indictment to charge any particular felony which the appellant had united and combined to commit. The jury must have understood from such charge that it was not necessary for the state to prove any particular felony.

The appellant asked the court to charge the jury that there could be no conviction unless it was proved that he had committed some overt act to carry out the purpose contemplated by the conspiracy. It is well settled, that it is not necessary, to constitute the offense of conspiracy, that any act should be done in pursuance of the conspiracy. See 4 Chitty's Blackstone, top p. 98, side p. 136, and note 31, and authorities there cited.

The judgment is reversed, with costs; and the cause is remanded for further proceedings in accordance with this opinion; and the clerk will give immediately the necessary notice for the return of the prisoner.

PEOPLE vs. WILSON.

(64 Ill., 195.)

CONTEMPT: *Newspaper article—Liability of proprietor of newspaper—Liability of managing editor—Publication as to pending case.*

A newspaper article concerning a criminal case pending before the supreme court which prophesies that the prisoner will get a new trial and eventually escape justice, because \$1,400 is enough now-a-days to purchase immunity from the consequences of any crime, and that "the courts are now completely in the control of corrupt and mercenary shysters—the jackals of the legal profession—who feast and fatten on human blood, spilled by the hands of other men," is a contempt of court of flagrant character, and calculated to

embarrass and obstruct the administration of justice. SCOTT and SHELDON, JJ., dissenting.

Under a statute that "the said court shall have power to punish contempts offered by any person to it while sitting," the court has power to punish for a constructive contempt committed by a newspaper article referring to a case then pending before the court. All acts calculated to impede, embarrass or obstruct the court in the administration of justice should be considered as done in the presence of the court.

It seems that the court would have no right to punish any criticism on its decisions or official conduct in regard to cases that are ended, so long as its action is correctly stated and its official integrity is not impeached.

The proprietor of a newspaper may be punished for contempt for an article published in the newspaper owned by him, although such article was published without his knowledge and consent, when, to a rule to show cause why he should not be punished, he makes no defense as to matters of fact, except that he did not know or sanction it before publication.

The managing editor of a newspaper may be punished for contempt for permitting the publication of a newspaper article, which, although not written by him, was seen by him before publication, and which he had power to exclude from the paper.

On a rule to show cause why an attachment should not issue against the respondents for a contempt, if the respondents rely on an excuse only, they should appear in person. If they appear by attorney, and defend on legal grounds, an excuse can only be regarded in mitigation of punishment, and not as ground for discharging the rule.

THIS was a proceeding in the name of *The People v. Charles L. Wilson and Andrew Shuman*, the publisher and editor of a newspaper published in the city of Chicago, called the "Chicago Evening Journal," for an alleged contempt of this court, in the publishing in said newspaper, on the 16th day of October, 1872, during the sitting of said court at the September term, 1872, thereof, of an article which appeared as an editorial in said newspaper, in reference to the case of *Christopher Rafferty v. The People*, which was then pending, on writ of error, in this court. The article referred to is set forth in the following information, presented to the court by the Attorney General, on the 23d of October, 1872:

"STATE OF ILLINOIS — *Supreme Court* — ss.

"*Northern Grand Division — September Term, A. D. 1872.*

"THE PEOPLE OF THE STATE OF ILLINOIS vs. CHARLES L. WILSON
AND ANDREW SHUMAN.

"INFORMATION — And now come the said People, by Washington Bushnell, Attorney General, and represent to the court

that on the 16th day of October, A. D. 1872, there was, and still is, pending in this court, a certain cause for the adjudication and determination of this court, wherein one Christopher Rafferty is plaintiff in error, and the People of the State of Illinois are defendants in error, and that, on the same day there was published in the city of Chicago, in said state, a certain daily newspaper, called the 'Chicago Evening Journal,' of which said paper on said day the said *Charles L. Wilson* was proprietor, and the said *Andrew Shuman* was editor, and that said *Charles L. Wilson* and *Andrew Shuman*, on the said day, caused to be published in said paper, of and concerning said cause so pending in this court, and of and concerning this court and its supposed action with reference to said cause, a certain article, in the words following, that is to say:

“THE CASE OF RAFFERTY. At the time a writ of supersedeas was granted in the case of the murderer Chris. Rafferty, the public was blandly assured that the matter would be examined into by the supreme court and decided at once; that possibly the hanging of this notorious human butcher would not be delayed for a single day. Time speeds away, however, and we hear of nothing definite being done. Rafferty's counsel seems to be studying the policy of delay, and evidently with success. The riff-raff, who contributed fourteen hundred dollars to demonstrate that hanging is played out, may now congratulate themselves on the success of their little game. Their money is operating splendidly. We have no hesitancy in prophesying clear through to the end just what will be done with Rafferty. He will be granted a new trial. He will be tried somewhere, within a year or two. He will be sentenced to imprisonment for life. Eventually he will be pardoned out, and this in spite of all our public meetings, resolutions, committees, virtuous indignation and what not. And why? Because the sum of fourteen hundred dollars is enough now-a-days to enable a man to purchase immunity from the consequence of any crime. If next winter's session of the legislature does not hermetically seal up every chink and loophole through which murderers now escape, it will deserve the bitter censure of every honest man in Illinois. We must simplify our modes of procedure in murder trials. The criminal should be tried at once, and when found guilty, should be hanged at once and the quicker hanged the better. The courts are now

completely in the control of corrupt and mercenary shysters — the jackals of the legal profession — who feast and fatten on human blood spilled by the hands of other men. All this must be remedied. There can be found a remedy, and it must be found.’

“Wherefore the said attorney general, for and on behalf of the said people, moves this court for rule upon the defendants Charles L. Wilson and Andrew Shuman, to be and appear before this court, on a day to be named, and show cause, if any, they, or either of them have, why an attachment should not issue against them for contempt of this court in respect to the publication of said article. WASHINGTON BUSHNELL, *Att’y Gen’l.*”

Afterwards, on the 25th day of the same month of October, a rule was entered of record, requiring the said Charles L. Wilson and Andrew Shuman on or before the coming in of the court on the first day of November next following, to show cause, if any they should have, why an attachment should not issue against them, for a contempt of this court, in the publishing of the article mentioned. Accordingly, in obedience to such rule, on the said first day of November, there was filed in behalf of the respondent Wilson the following answer:

“And now comes Charles L. Wilson, one of the above respondents, in obedience to the rule heretofore, to wit: on the 25th day of October A. D. 1872, entered in said court, requiring this respondent and Andrew Shuman to show cause why an attachment should not issue against them, for a contempt of said court, on account of the matters and things in a certain information filed in said court, in said rule mentioned, and in answer to the said rule, this respondent says, that he is the sole proprietor of the said newspaper, mentioned in the said information, called the Chicago Journal, and that the article set forth in said information was published therein on the 16th day of October, 1872, but this respondent says that neither before, nor at any time of the publication, had he any knowledge or information relative to the same. This respondent did not know before said paper in which the article appeared was published, that said article, or any article upon the subject, was written, or to be written, or that any article upon the subject was to be published, and that he neither advised, or counseled, nor was he advised or counseled with by any person whatever, relative to the publication of said article, or any article whatever upon the subject.

"This respondent further says, that the first knowledge or information he had relative to said article, on its publication, was when he read the said article in said paper, after its publication and distribution.

"This respondent further says, that he is informed and believes that no disrespect was intended by said article to said court, or to any judge thereof, and that a fair construction thereof will not warrant an inference to that effect.

"This respondent is advised and believes, that the publication of said article was not designed, and had no tendency to impede, embarrass or obstruct the administration of justice in said court. And this respondent does, and will insist that he had and still has the right, through his said paper, by himself or his agents, to examine the proceedings of any and every department of the government of this state, and that he is not responsible for the truth of such publication. nor for the motives with which they were or are made by the summary process of an attachment for contempt, save when such publications impede, embarrass or obstruct the administration of justice.

"This respondent further says, that such has been the established law of this state for over thirty years past, and that said court has no judicial power to change the same.

"This respondent takes this occasion to renew his repeated expressions of confidence in the ability and integrity of said court, and of the individual members of the same, and as evidence of the same gives the following article, which was published in said paper, issued on the 26th of September, 1872; that is to say: 'The supreme court of Illinois, although, perhaps, too ready to grant motions for supersedeas, has no sympathy with criminals. The judges are all men infinitely above such suspicions. It is their business to examine every case appealed to them, without any bias one way or the other, taking note solely of the facts presented in each case. The question for the higher court to decide is this: Did the accused, from first to last, have a fair trial? The presumption is that he did, and the rule is to grant a supersedeas only in case it is clear that he did not have a fair trial. While we cordially commend the zeal of the prosecuting attorney and of our courts in their efforts to check the appalling frequency of murders in this city and county, we suggest to them more caution in observing all the forms and technicalities of the law in

the conduct of future murder trials. The supreme court will certainly continue to insist upon it, and every supersedeas granted acts as a premium upon murder.'

"This respondent further says, that at the time of the publication of said article first mentioned, there was an intense excitement in the community, and particularly in the city of Chicago, on account of frequent murders, and the escape of the perpetrators thereof; and this respondent is informed and believes that the design of said article was to impress upon the community the importance of electing members of the next general assembly of this state, who would remedy the defects in the criminal law of this state, by which criminals are able to escape punishment, and not to reflect upon the ability or integrity of said court, or any member thereof, nor to impede, embarrass or obstruct the administration of justice. Wherefore, this respondent prays that the said rule, as against him, may be discharged.

"CHARLES L. WILSON."

"STATE OF ILLINOIS—*Cook County*—ss.

"Charles L. Wilson, being duly sworn, says he is one of the respondents named in the foregoing answer, and that the matters stated in said answer are true.

CHARLES L. WILSON."

"Subscribed and sworn to before me this 29th day of October, 1872.

HENRY W. FARRAR,

"*Notary Public.*"

And on the same first day of November, the following answer was filed in behalf of the respondent Shuman:

"And now comes Andrew Shuman, one of the respondents, in obedience to the rule heretofore, to wit, on the 25th day of October, 1872, entered in said court, requiring the respondent and Charles L. Wilson to show cause why an attachment should not issue against them, for a contempt of said court, on account of the matters and things alleged in a certain information filed in said court, in said rule mentioned, and in answer to said rule this respondent says, that he is managing editor of said newspaper, mentioned in the said information, called the Chicago Journal, and that the article set forth in said information was published therein on the 16th day of October, 1872.

"But this respondent says that said article was not written by him, nor by his procurement or advice, but by an assistant editor of said newspaper, which said article was submitted to this re-

spondent for his examination before the same was published, as are all articles prepared for publication in said paper. Upon the submission of said article to this respondent, he read the same, and allowed it to be published without dissent on his part, and without supposing that there was anything in it disrespectful to, or in contempt of, said court, or of any of its judges or officers. The wording and expressions of said article were, as this respondent then believed and still believes, designed and intended to impress upon the public, and upon the next legislature of this state, the necessity of such a change in the laws regulating and governing the trial of persons accused or convicted of crime, as to ensure a more speedy and certain punishment, and that this was the only aim, purpose or intention of said article.

"This respondent further says, that a fair construction of said article will not warrant an inference that any disrespect was intended by the same to the said court, or any judge thereof. This respondent is advised and believes, that the publication of said article had no tendency to impede; embarrass, or obstruct the administration of justice in said court; that it was not so designed, and had not that tendency. And this respondent does, and will insist, that he had and still has the right, as managing editor of said paper, to examine the proceedings of any and every department of the government of this state, and that he is not responsible for the truth of said publication, nor for the motives with which they were or are made, by the summary process of an attachment for contempt, save when such publications impede, embarrass or obstruct the administration of justice.

"This respondent further says, that such has been the established law of this state for over thirty years past, and that said court has no judicial power to change the same.

"This respondent takes this occasion to renew his repeated expressions of confidence in the ability and integrity of said court, and of the individual members of the same, and as evidence thereof, gives the following article, which was published under his supervision, in said paper, issued on the 26th day of September, 1872, that is to say:

"The supreme court of Illinois, although, perhaps, too ready to grant motions for supersedeas, has no sympathy with criminals. The judges are all men infinitely above such suspicion. It is their business to examine every case appealed to them, without

any bias, one way or the other, taking note solely of the facts presented in each case. The question for the higher court to decide is this: Did the accused, from first to last, have a fair trial? The presumption is that he did, and the rule is to grant a supersedeas only in case it is clear that he did not have a fair trial. While we cordially commend the zeal of the prosecuting attorney, and of our courts, in their efforts to check the appalling frequency of murders in this city and county, we suggest to them more caution in observing all the forms and technicalities of the law in the conduct of future murder trials. The supreme court will certainly continue to insist upon it, and every supersedeas granted acts as a premium upon murder.' *

"This respondent further says, that at the time of the publication of said article, first mentioned, there was an intense excitement in the community, and particularly in the city of Chicago, on account of the frequent murders, and the escape of the perpetrators thereof, and this respondent is informed, and believes, and so he understood at the time, that the design of said article was to impress upon the community the importance of electing members to the next general assembly of this state, who would remedy the defects in the criminal laws thereof, by which criminals are able to escape punishment, and not to reflect on the ability or integrity of said court, or any member thereof, nor to impede, embarrass or obstruct the administration of justice.

"Wherefore this respondent prays that said rule, as against him, may be discharged. ANDREW SHUMAN."

"STATE OF ILLINOIS — *Cook County* — ss.

"Andrew Shuman, being duly sworn, says he is one of the respondents named in the foregoing answer, and that the matters stated in said answer are true. ANDREW SHUMAN."

"Subscribed and sworn to before me this 31st day of October, 1872. CYRUS J. CORSE, *Notary Public*."

Mr. *Washington Bushnell*, Attorney General, for the people:

I desire, in this case, respectfully to call the attention of the court to the following authorities, which, in my judgment, are conclusive upon the question of the power of this court to issue a writ of attachment against the respondents, for the publication of the matters and things contained in the information herein filed.

It is a contempt, punishable by attachment, to publish re-

marks in a newspaper, which have a tendency to prejudice the public with respect to the merits of a cause depending in court, and to corrupt the administration of justice. 4 Black. Com., 286; *Ex parte Biggs*, 54 N. C., 202; id., 398; 1 Dall., 319.

A publication pending a suit, reflecting on the court, the parties to the suit, the witnesses, the jurors or the counsel, is a contempt of court. *Hollingsworth v. Duane*, Wall., 77, 102; *Bronson's Case*, 12 Johns., 460; 4 Black. Com., 286.

The publication of a paper to prejudice the public mind in a cause depending is a contempt, if it manifestly refer to the suit, though it do not expressly appear on the face of the writing. *Respublica v. Passmore*, 3 Yates, 438.

Denying any criminal or disrespectful design, in publications reflecting on the proceedings before the court, will not justify the party, if they appear to the court to amount to a contempt. *People v. Freer*, 1 Caines, 458, 518.

The provision in the constitution of the United States, that the trial of all crimes shall be by jury, does not take away the right of courts to punish contempt in a summary manner. The provision is to be construed to relate only to those crimes which by our former laws and customs had been tried by a jury. *Hollingsworth v. Duane*, Wall., 77, 106.

The House of Representatives of the United States may punish persons not members thereof for contempt. *Anderson v. Dunn*, 6 Wheat., 204.

This power is also incident to courts of law and equity. *Mariner v. Dyer*, 2 Greenl., 165; *State v. White*, Charl., 136; *Yates v. Lansing*, 9 Johns., 395; 6 id., 337; 4 id., 316; Trial of Smith & Ogden, 73; *State v. Tipton*, 1 Blackf., 166; 1st Burr's Trial, 352; *Clark v. People*, 1 Breese, 266; 8 Conn., 379; *United States v. Hudson*, 7 Cranch, 32; see 1 Kent's Com., 3d ed., 300 (note B). See also the case of *State v. Matthews*, 37 N. H., 453, and authorities there quoted.

In the celebrated case of *The Commonwealth v. John Danbridge*, 2 Va. Cas., 414, the court say: "They cannot but feel it a delicate task to define and decide upon the extent of their own powers, nor be ignorant that the judgment they are called upon to render may expose them, on the one hand, to the imputation of timidity and irresolution, or on the other, to that of usurpation and tyranny. The verity of these suspicions

would not be more unworthy of the judges than the fact of their shrinking from this question, because of the consequences in which themselves might be involved in it. * * * In this country we know of no privileges but such as exist for the public good. Many such privileges we have, from those which appertain to the legislature itself down to such as belong to the lowest executive officer. Those which surround the administration of justice belong to the same order. Courts, their officers and process, are shielded from invasion and insult, not from any imaginary sanctity in the institutions themselves or the persons of those who compose them (as in the political and ecclesiastical establishments of another hemisphere) but solely for the purpose of giving them their due weight and authority, and to enable those who administer them to discharge their functions with impartiality, fidelity and effect.

"This is the true test of every privilege not granted by statute, and is the spirit of every one (not merely private) which is so secured. The political character of the judiciary, and the tendency of the duties which are devolved upon it, have rendered it necessary to invest it with a considerable share of these privileges.

"It is confessedly the weakest branch of all governments, wielding neither wealth, force nor patronage. Its duties consist in adjusting and settling the contested rights of individuals, in controlling their turbulence and punishing their crimes. These duties are often of a severe and rigorous character, and they are generally to be discharged in almost immediate contact with those on whom they act. Their exercise will frequently elicit the angry passions, or excite unworthy and sinister attempts to bias or avert their operation, and where there is little real power and no patronage, a certain degree of external dignity may have been considered necessary to supersede a too frequent resort to the actual powers of the courts."

In 4 Blackstone, 283, that writer says: "The contempts that are thus punished are either direct, which openly insult or resist the powers of the courts, or the persons of the judges who preside, etc;" and on page 285, in enumerating the contempts which degrade the judicial authority, he refers to one which consists "in speaking or writing contemptuously of the court or judges acting in their judicial capacity."

If the matters complained of arise at a distance, of which the court cannot have so perfect a knowledge, unless by the confession of the party or the testimony of others, it will in its discretion award the proper process to bring the party before it, of which process of attachment is one. 2 Va. Cas., p. 436.

That to scandalize a court by speaking or writing, either in its presence or absence is a high contempt. Let the judges of a court be proclaimed in public print as corrupt cowards, when acting in their judicial capacity, and how long will it be before such judges and the courts held by them will be covered with opprobrium and contempt? *Id.*, 436.

It is a high contempt, punishable as aforesaid, to publish, by speaking or writing, anything during the pendency of a particular cause in any such court, by which an imputation is cast upon the judges, or any one of the judges, as to their purity, impartiality or integrity as respects that cause. *Commonwealth v. Danbridge*, 2 Va. Cas., 436; 2 Atkyns; *Oswald's Case*, and the case of *The King v. Barber*, Strange, 444.

I do not desire to enter into any extended argument upon the merits of this application for a writ of attachment, and therefore content myself by referring this honorable court to the above authorities.

Beckwith, Ayer & Kales, for the respondents.

LAWRENCE, C. J. The respondents, Charles L. Wilson and Andrew Shuman, have been placed under a rule to show cause why an attachment should not issue against them for contempt. The information filed by the attorney general, upon which the rule was made, sets forth that one of the respondents is the proprietor, and the other chief editor, of a newspaper published in the city of Chicago, called the "Chicago Evening Journal," and presented as a ground for this proceeding an editorial article published in that paper on the 16th day of October. The article is set out at length in the information. It is entitled "The Case of Rafferty." Rafferty had recently been tried for murder, in Cook county, found guilty, and sentenced to death. A writ of error, staying the execution of the sentence until the further order of this court, had been granted, and this writ of error was pending and undetermined before us at the date of the publication. The article published is as follows:

"THE CASE OF RAFFERTY. — At the time a writ of supersedeas was granted, in the case of the murderer Chris. Rafferty, the public was blandly assured that the matter would be examined into by the supreme court, and decided at once — that possibly the hanging of this notorious human butcher would not be delayed for a single day. Time speeds away, however, and we hear of nothing definite being done. Rafferty's counsel seems to be studying the policy of delay, and evidently with success. The riff-raff who contributed fourteen hundred dollars to demonstrate that 'hanging is played out' may now congratulate themselves on the success of their little game. Their money is operating splendidly. We have no hesitancy in prophesying clear through to the end just what will be done with Rafferty. He will be granted a new trial. He will be tried somewhere, within a year or two. He will be sentenced to imprisonment for life. Eventually he will be pardoned out. And this, in spite of all our public meetings, resolutions, committees, virtuous indignation, and what not. And why? Because the sum of fourteen hundred dollars is enough nowadays to enable a man to purchase immunity from the consequences of any crime.

"If next winter's session of the legislature does not hermetically seal up every chink and loop hole through which murderers now escape, it will deserve the bitter censure of every honest man in Illinois. We must simplify our mode of procedure in murder trials. The criminal should be tried at once, and when found guilty should be hanged at once — and the quicker hanged the better.

"The courts are now completely in the control of corrupt and mercenary shysters — the jackals of the legal profession — who feast and fatten on human blood spilled by the hands of other men. All this must be remedied. There can be found a remedy, and it must be found."

To the rule granted upon the motion of the attorney-general, the respondents have severally answered under oath. They have declined to argue the case, either orally or in writing, though opportunity has been allowed for that purpose.

The respondent Wilson admits, in his answer, that he is the proprietor of the newspaper, but denies all knowledge of the article prior to its publication. While this fact should influence the degree of the punishment to which he may be liable, it does

not exonerate him from responsibility. The respondent Shuman admits he is the editor in chief. He denies the authorship of the article, but says he read it before its publication, and permitted it to be published. Both respondents disavow any intentional disrespect to the court, or any design to embarrass the administration of justice, and insist that they have the right to examine the proceedings of every department of the government of this state, and that they are not responsible, in a proceeding of this character, for the truth of their publications, or for the motives with which they may be made, "save when such publications impede, embarrass or obstruct the administration of justice."

They state, under the solemnities of an oath, as a fact within their personal knowledge that "such has been the established law of this state for over thirty years past, and that said court has no judicial power to change the same." Such a sworn statement, as to the law of contempt applicable to newspaper publications, is somewhat remarkable. If we give to the saving clause, in their answers, the interpretation which it was possibly designed to bear, the statement may be accepted not merely as a truth, but as a truism. The only ground for pronouncing any act or publication a contempt of court is, that it tends in its final results to "impede, embarrass, or obstruct the administration of justice." If, on the other hand, the respondents designed to say, or to be understood as saying, that they are privileged to make any publications concerning proceedings in court, however false, to assail the integrity of the court, or to endeavor to inflame popular passion concerning cases before it, and not be liable to attachment for contempt, unless it appear that the publication complained of really has the actual and visible effect of impeding, embarrassing or obstructing the administration of justice, in a manner susceptible of proof as an accomplished fact—if the answers are to be understood in this sense, it is to be regretted that the respondents were not better advised as to the law, before swearing what the law is.

The revised code of 1845, in speaking of the supreme court, contains the following provision: "The said court shall have power to punish contempts offered by any person to it while sitting." This act has never been repealed or modified.

In the case of *Stuart v. The People*, 3 Scam., 405, decided in 1842, a similar provision in the statute of 1829, in regard to cir-

cuit courts, came before this court for construction. The court, after saying that the statute might, with great propriety, be regarded as a limitation upon the power of the court to punish for any other contempts than those committed in its presence, add the following most significant and important qualification: "In this power would necessarily be included all acts calculated to impede, embarrass or obstruct the court in the administration of justice. Such acts would be considered as done in the presence of the court."

The respondents evidently had this case before them when their answers were drawn. They use its language, with the exception of a most material word, which changes the meaning of the entire sentence. The respondents say the rule is, that publications are a contempt only when they impede, embarrass or obstruct the administration of justice. The rule laid down by this court was that they are a contempt when they are calculated to have that effect. The difference is radical, and marks precisely the difference between the guilt or innocence of the respondents in this case. They swear to a rule which would require us to say that we have actually been impeded, embarrassed or obstructed in the administration of justice, before we can hold the respondents guilty of contempt. The true test is, not whether the court has been weak or base enough to be actually influenced by a publication, but whether it was the object and tendency of the publication to produce such an effect.

It need hardly be said that we can not accept, as a reason for discharging the rule, the disclaimer in the answers of any intentional disrespect or any design to embarrass the administration of justice. The meaning and intent of the respondents must be determined by a fair interpretation of the language they have used. They cannot now escape responsibility by claiming that their words did not mean what any reader must have understood them as meaning.

No candid man can deny that the article in question was well calculated to make upon the public mind the impression that the court, in a pending suit, was influenced by money in its judicial action, and that it could be so influenced in other cases. Neither can it be denied that the article seeks to intimidate the court as to the judgment to be pronounced, in a case then pending, and involving the life or death of a human being. The

article declares that the money raised for Rafferty "is operating splendidly;" predicts that he will be granted a new trial, and avers that "the sum of fourteen hundred dollars is enough now-a-days to enable a man to purchase immunity from the consequences of any crime," and that "the courts are now completely in the control of corrupt and mercenary shysters — the jackals of the legal profession." This language will bear but one interpretation.

I shall not stop to cite and discuss the authorities bearing on the law of contempt, as that labor has been performed by another member of the court; I merely quote the rule as laid down by Bishop, an American writer, in his work on Criminal Law, section 216. He uses the following language: "According to the general doctrine any publication, whether by parties or strangers, which concerns a case pending in court, and has a tendency to prejudice the public concerning its merits and to corrupt the administration of justice, or which reflects on the trial or its proceedings, or on the parties, the jurors, the witnesses or the counsel, may be visited as a contempt." Whether tested by this common law definition or by the rule laid down by this court in the case of Stuart, already cited, there is no room for doubt that the article in question must be held a contempt of flagrant character. It related to a case in court involving in its final issues a human life. The answers of the respondents state that at the time of the publication "there was intense excitement in the community, and particularly in the city of Chicago, on account of the frequent murders, and the escape of the perpetrators thereof." This, no doubt, is true, and this article seems to have been studiously written, with a view to direct popular clamor against this court, and compel it either to affirm the judgment sending Rafferty to execution, or incur the imputation of bribery and the clamor of an angry city to be echoed throughout the state by a portion of the Chicago press. The demand was not that we should calmly examine the record of Rafferty's trial to see whether his conviction had been legal, but that we should give him over to execution, because there was such impunity for crime in the city of Chicago that it was necessary some man should be immediately hung. We have since examined the records of this man's conviction, and reversed the judgment, all the

members of the court holding that a plain provision of the statute had been violated on his trial.

Let us say here, and so plainly that our position can be misrepresented only by malice or gross stupidity, that we do not deprecate, nor should we claim the right to punish, any criticism the press may choose to publish upon our decisions, opinions or official conduct in regard to cases that have passed from our jurisdiction, so long as our action is correctly stated, and our official integrity is not impeached. The respondents are correct in saying in their answers that they have a right to examine the proceedings of any and every department of the government. Far be it from us to deny that right. Such freedom of the press is indispensable to the preservation of the freedom of the people. But certainly neither these respondents nor any intelligent person connected with the press, and having a just idea of its responsibilities as well as its powers, will claim that it may seek to control the administration of justice or influence the decision of pending causes.

A court will, of course, endeavor to remain wholly uninfluenced by publications like that under consideration, but will the community believe that it is able to do so? Can it even be certain in regard to itself? Can men always be sure of their mental poise? A timid man might be influenced to yield, while a combative man would be driven to the opposite direction. Whether the actual influence is on one side or the other, so far as it is felt at all, it becomes dangerous to the administration of justice. Even if a court is happily composed of judges of such firm and equal temper that they remain wholly uninfluenced in either direction, nevertheless a disturbing element has been thrown into the council chamber, which it is the wise policy of the law to exclude.

Regard it in whatever light we may, we can not but consider the article in question as calculated to embarrass the administration of justice, whether it has in fact done so or not, and, therefore, as falling directly within the definition of punishable contempts, announced by this court in the case of *Stuart v. The People*. It is a contempt, because, in a pending case of the gravest magnitude, it reflects upon the action of the court, impeaches its integrity, and seeks to intimidate it by the threat of popular clamor.

It may be said that, as long as the court was conscious it had not been frightened from its propriety by the article in question, the wiser course would have been to pass it by in silence.

So far as we are personally concerned, we should have preferred to do so. We desire no controversy with the press. But a majority of the court were of opinion that this publication could not be disregarded without infidelity to our duty. But by our relations to the bar, to the suitors in our court, to the entire judiciary of the state, and to the state itself, we felt constrained to call the persons responsible for this publication to account.

It may further be said that this article could do no permanent injury to a court strong in the consciousness of its own integrity, and in the confidence reposed in it by the people, and, therefore, the publication was unworthy of notice. It is quite true that a solitary paragraph, under ordinary circumstances, would have probably been innocuous. It is to be observed, however, that the answers of the respondents speak of the existing excitement in Chicago in regard to unpunished crime, and in that state of the public mind there was great probability that this article would win a ready credence if permitted to go unchallenged. Public meetings had been held, committees had been appointed to aid in the suppression of crime. The papers of Chicago, circulating throughout the state and the northwest, had called attention to this subject. It was made a frequent topic of discussion in the public prints, and when, finally, this article appeared, in a paper of noted sobriety and respectability, containing charges and imputations against this court, which were simply infamous, the majority of the court felt that it was necessary for the good name of the state, within and without its borders, and necessary in order to preserve the confidence of the people wholly unshaken in this court, to request the attorney general to move for a rule against these respondents. The majority of the court still think they have acted wisely. We have been controlled by no feeling of personal malignity, and do not propose to inflict a severe punishment. We wish to call the attention of the press to the limits which circumscribe their comments on judicial proceedings, and to remind them of the obligations imposed upon them by the great power which they confessedly wield. Especially do we desire to keep the judicial reputation of the state free from the appearance of dishonor, and to prevent the growth

of that distrust in the minds of our own people that would certainly follow the circulation of articles like the one under consideration, if permitted to go unrebuked.

The loss of public confidence in our integrity would be a calamity little less than the loss of official integrity itself. The pomp and circumstance which in England aid to clothe the courts and the law with dignity and power, are not in consonance with our republican form of government. In this country the power of the judiciary rests upon the faith of the people in its integrity and intelligence. Take away this faith, and the moral influence of the courts is gone, and popular respect for law impaired. Law with us is an obstruction. It is personified in the courts as its ministers, but its efficacy depends upon the moral convictions of the people. When confidence in the courts is gone, respect for the law itself will speedily disappear, and society will become the prey of fraud, violence and crime.

The one element in government and society which the American people desire above all things else, to keep free from the taint of suspicion, is the administration of justice in the courts. So long as this is kept pure, a community may undergo extreme misgovernment, and still prosper. But when these tribunals have become corrupt, and public confidence in them is destroyed, the last calamity has come upon a people, and the object of its social organization has failed. The protection of life, liberty and property is the final aim of all government. This is accomplished by an honest administration of just laws. The people, by their representatives, may be relied upon to pass such laws, but unless they are honestly administered, neither life, liberty nor property enjoys the security which it is the object of government and society to give. If the time shall unhappily ever come when the judiciary of this state has become hopelessly corrupt, and justice is bought and sold, the loss of its moral and material well being will as certainly follow as the night follows the day.

We are glad to say, that for more than half a century the judiciary of this state has not only enjoyed the confidence of the people, but also has received the support of the press. Never before, so far as the members of the court are aware, has the integrity of this tribunal been assailed by a public journal. The respectability of the paper in which the article in question has appeared, and the circumstances surrounding its publication,

have given it a gravity which a casual article of like import would not possess. We have personally felt great reluctance to taking notice of the publication, but our consciousness of the mischief that may be done in embarrassing the administration of justice, and impairing the moral authority of the judiciary throughout the state, if this article is to stand as an unpunished precedent, has compelled us to issue the rule, and now compels us to order an attachment.

It is the judgment of a majority of the court that an attachment issue against Charles L. Wilson and Andrew Shuman, returnable forthwith.

WALKER, J. I am also of the opinion that a writ of attachment should issue in this case.

MCALLISTER, J., concurring. At the return of the rule to show cause, the defendants did not appear in person, but caused their separate returns under oath to be filed by attorneys, who declined to appear and argue the question raised by the returns. In this aspect of the case it is unnecessary to consider how far the matters set forth go in excuse of the publication; because, if the defendants relied upon an excuse only, they should have appeared in their own proper person. Not having done so, no mere excuse can be regarded as a cause for discharging the rule, but only as going to the question of punishment, in the event that the court finds the absence of a legal justification in the return. *The People v. Freer*, 1 Caines, 519.

The only legal justification sought to be established by the returns is the disavowal of a bad intent, and matter of law arising upon the face of the whole proceeding. In this behalf their position is that they have the legal right to do just what they have done, and this court has no power or authority, by this proceeding, to call their acts into question, inquire into their motives or the pernicious tendency of the publication. The editor of the paper states his position thus: "This respondent is advised and believes that the publication of said article had no tendency to impede, embarrass or obstruct the administration of justice in said court; that it was not so designed and had not that tendency, and this respondent does and will insist that he had, and still has, the right, as managing editor of said paper, to examine the

proceedings of any and every department of the government of this state, and that he is not responsible for the truth of such publication, nor for the motives with which they were or are made, by the summary process of attachment for contempt, save when such publications impede, embarrass or obstruct the administration of justice."

This position has been deliberately taken, and it is all there is of the case. If it has been well taken, the rule should be discharged; if ill, the attachment should issue. For the purpose of analyzing the alleged justification, we will treat it as in the nature of a plea in bar. Then what are its elements? By the return, actual participation in the act of publication by the editor, and constructive by the proprietor, are admitted. Then the only fact presented is the one of intent, by a disavowal of any bad intent; for the question, whether or not the publication had a tendency or was calculated to impede, embarrass or obstruct the administration of justice, is clearly a question of law, to be determined by the court upon inspection of the article. So, also, is that of the power of the court.

The return impliedly admits, that if the publication had the tendency to impede, embarrass or obstruct the administration of justice, the power of the court to punish the defendants for a contempt exists; but it claims virtually that the exercise of the power is precluded by the disavowal of any bad intent, and defendants' denial that the article had any such pernicious tendency. If the publication had the pernicious tendency which is claimed for it on behalf of the people, it is believed that no respectable authority can be found to the effect that a disavowal of a bad intent amounts to a justification. It would be contrary to the rule of law that every man must be presumed to intend the natural and necessary consequences of his own deliberate acts. In the case of *The People v. Freer*, above cited, which was a proceeding like this, the point was expressly adjudicated by the supreme court of New York, KENT, J., delivering the opinion of the court: "We cannot but perceive," said that great judge, "that the disavowal of any bad intent will not do away with the pernicious tendency or effect of publications reflecting on judicial proceedings which are before us."

I have said that the construction and tendency of the article in question were a matter of law for the court. Of the truth of this

proposition there can be no doubt. But the court is bound to give it a fair and reasonable construction, according to the natural and common import of the language employed; and when so construed, the question whether its publication constituted a contempt which the court is authorized to punish by attachment, must be determined by the character of the publication and the circumstances under which it was made.

As to the circumstances, it will suffice to say, that at the time of the publication, the case of Rafferty, referred to in the article, was pending before us for decision. This fact was well known to the defendants, and especially to the editor, as appears by both his return and the article itself. It is of that cause and its pendency here that the article speaks; and the ordinary and natural meaning of the language used conveys, in the most direct and unequivocal manner, the charge of corruption on the part of this court, in respect to that very case; and was calculated and intended to portray the character and position of the court as being so degraded as to be under the control of the most unprincipled and despicable class of society. The first paragraph, relating to the delay of the court in deciding the case, evidently refers to its action at the time of allowing the supersedeas, in requiring Rafferty's counsel to submit the cause, in order that it might be passed upon at this term. Then it proceeds: The riff-raff who contributed fourteen hundred dollars to demonstrate that "hanging is played out" may now congratulate themselves on the success of their little game. Their money is operating splendidly. We have no hesitancy in prophesying clear through to the end just what will be done with Rafferty. He will be granted a new trial. He will be tried somewhere, within a year or two. He will be sentenced to imprisonment for life. Eventually he will be pardoned out, and this in spite of all our public meetings, resolutions, committees, virtuous indignation and what not. And why? Because the sum of fourteen hundred dollars is enough now-a-days to purchase immunity from the consequences of any crime. Then, that there might be no misunderstanding as to what is meant by this tissue of scandal, there come these significant words: "The courts are now completely in the control of corrupt and mercenary shysters — the jackals of the legal profession, who feast and fatten on human blood spilled by the hands of other men." This

expression would be understood, and was intended, to refer to this court, which was the only one previously alluded to; and what more degrading and scandalizing charge could be couched in language? It is well understood by the public that this court is the only one in the state which has the power to license and strike the names of attorneys from the rolls. If the court is under the complete control of the vile class designated, the degradation must be voluntary on the part of the court, yet it is here proclaimed to the public that a court which possesses the power to rid itself of the shysters and jackals of the legal profession is, nevertheless, completely under their control. After this charge, is followed what may well be called a threat. "All this must be remedied; there can be found a remedy, and it must be found."

The tendency of the article is to degrade and scandalize the court, to overawe its deliberations and extort a decision against the accused. That such was the intent and purpose, scarcely admits of a doubt. In this attempt to extort a decision of affirmation, rests the great criminality of the article, rather than the reflections upon the court. Publications scandalizing the court, and intended to unduly influence and overawe its deliberations in causes pending, are contempts which this court is authorized to punish by attachment, and it is essential to the dignity of character, the utility and independence of the court, that it should possess and exercise such authority. Here the corruption is imputed, and the effect predicted in such a manner as to prepare the public mind to believe the charge, if the decision turns out to be as predicted. Any well constituted judge would receive the threats of a mob gathered about the court house for the purpose of overawing his deliberations upon a particular case, with far greater coolness and equanimity, than such a threatened blot upon his character. Whatever may be the character of Rafferty, however humble and lowly in life, or however bad a man he may be, he is nevertheless clothed with the same constitutional rights which belong to the highest and best citizens in the state. He can be deprived of his life only by due process of law. He has the same right to invoke the safeguards devised for the protection of innocence, and to secure a fair and impartial trial, as though he were in fact innocent, and as any other citizen might do; because the law is, and in the nature of

things must be, general in its application. The establishment of these rights by our beneficent constitution has cost too much suffering and blood, though in the distant past, to be readily relinquished by an intelligent people; and it seems an extraordinary spectacle to witness such an attack upon the character of this court, acting under the sanction of an oath of office, for exhibiting in its judicial action a proper respect for principles heretofore esteemed so sacred and so indispensable to the proper protection to life and liberty, and I can not refrain from remarking in this connection, that if this publication was made for the purpose of destroying those safeguards as a necessity for the suppression of the crime of murder in Chicago, as is avowed in the return, such a purpose ought to enhance instead of mitigating the criminality of the publication. It would take a long time, in my judgment, to inspire those criminally disposed, those born and reared in the haunts of vice, neglected by parents and society, without moral development, with a feeling of just respect for the sanctity of human life, by giving them examples, frequent examples, of the summary and reckless violation of that sanctity, by the public authorities, under forms of law divested of all the consecrated principles for the protection of innocence, by trials which could not be otherwise than grim mockeries of justice, controlled, swayed, and their results dictated by the passion and popular clamor of the hour. While I may truly say, that I have no feeling of resentment for the unwarranted attack upon the court of which I am a member, yet for this assault upon institutions which I have been educated to revere, I have feelings of deprecation and sorrow; and it is to be believed that a little careful observation and sober reflection will lead both the people and the press of Chicago to the conclusion that the fault lies not in the law nor yet in the courts. It seldom happens that a good and careful lawyer who has a good cause and wins it, has any trouble with errors in his record.

It is an unpleasant duty, but I feel constrained by the deepest convictions of conscience, by a lively regard for the credit of the state and her institutions, for the administration of justice, to concur in the opinion, that the rule should be made absolute, and that an attachment should issue.

THORNTON, J., also concurring. A return has been made to
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the rule issued in this case, in which the respondents acknowledge the publication of the article, in the Chicago Evening Journal, and insist upon the right, through their paper, to examine the proceedings of every department of the government of the state, and that they are not responsible for such publications nor answerable to the summary process of attachment for contempt, unless the publications impede, embarrass or obstruct the administration of justice. It is also urged that the publication had no such tendency.

The cause pending in the court, when the obnoxious publication was made, was *Rafferty v. The People*. Rafferty had been found guilty of murder, in the court below, and sentenced to be hanged. As was his right, according to the constitution and laws of the land, he demanded of this court a calm and dispassionate examination of the facts and questions presented in the record, and insisted that the law had been violated in his trial and conviction.

The life of a fellow man awaited our decision. The result to him was fearful; grave responsibility rested upon the court and the counsel, and solemn deliberation was required.

Under such circumstances, the publication was made, and while the court was in session. It refers to the court, and the case pending in it; intimates that the court had blandly assured the public that there should be a speedy examination; asserts that time had sped away, and no information had been given that anything definite had been done; that the prisoner's counsel was studying the policy of delay, with success, that the sum of fourteen hundred dollars, contributed to demonstrate that "hanging is played out," is operating splendidly; that the prisoner will be granted a new trial, and finally pardoned, in spite of the virtuous indignation of the public, "because the sum of fourteen hundred dollars is enough nowadays to enable a man to purchase immunity from the consequences of any crime," and then charges that "the courts are now completely in the control of corrupt and mercenary shysters, the jackals of the legal profession, who feast and fatten on human blood, spilled by the hands of other men." The slight allusion to the action of the legislature cannot relieve the gross attack upon the court and its officers. The case referred to in the publication has been reversed by a unanimous court, for manifest error in denying the accused a change of

venue, and thus, it may be, depriving him of an impartial trial, vouchsafed to him by the constitution and the laws.

Was the publication a contempt of court? Or can there be none, except for disobedience of its orders or process, or disorderly or contemptuous behaviour in its presence?

The law, as it is written, must answer. In 2 Hawkins, 220, contempts are classified, as contempts in the face of the court, and contemptuous words or writings concerning the court. Again, they are termed ordinary or extraordinary. The latter consist of abusive and scandalous words respecting the court. Bouvier's Inst., vol. 4, 385. According to Blackstone, book 4, 285, they may be committed either in the face of the court, or "by speaking or writing contemptuously of the court or judges acting in their judicial capacity."

This court has defined them to be, direct, such as are offered in the presence of the court, while sitting judicially, or constructive, such, though not in its presence, as tend by their operation to obstruct and embarrass or prevent the due administration of justice. *Stuart v. The People*, 3 Scam., 395.

Bishop thus defines constructive contempts: "According to the general doctrine, any publication, whether by parties, or strangers, which concerns a cause pending in court, and has a tendency to prejudice the public concerning its merits, and to corrupt the administration of justice, or to reflect on the tribunal or its proceedings, or on the parties, the jurors or the counsel, may be visited as a contempt." Vol. 2, sec. 26.

In this state the constitution has established the judiciary, and made it a coördinate department of the state government. A necessary incident to its establishment is the power to punish for contempts.

This court held, in an early case, that the power to punish for contempts was an incident to all courts of justice, independent of statutory provisions. *Clark v. The People*, Breese, 340. Courts in other states have also announced the doctrine that the power is inherent in all courts of justice, necessary for self protection, and an essential auxiliary to the pure administration of the law. *United States v. New Bedford Bridge*, 1 Woodbury & Minot, 407; *State v. Johnson*, Brevard, 155; *Yates v. Lansing*, 9 Johns., 416; *Cassart v. The State*, 4 Ark., 541; *Neil v. The State*, 4 Eng. (Ark.), 263; *United States v. Hudson*, 7

Cranch, 32. The statute likewise approves the exercise of the power, when it provides that the supreme court "shall have power to punish contempts offered by any person to it while sitting." This provision was in force July 1, 1829, and was the law when the decision in the case of *Stuart v. The People, supra*, was rendered. The court then declared that the statute "affirms a principle inherent in a court of justice, to defend itself when attacked, as the individual man has a right to do for his own preservation." The statute merely affirms a preëxistent power, and does not attempt to restrict its exercise to contempts in the presence of the court, but leaves them to be determined by the principles of the common law.

Without the power, courts could not fulfill their responsible duties for the good of the public. They would lose all self-respect and would not perform the duty they owe to the state, if they failed to struggle for their independence and defend their life.

No one doubts either the right or duty of a court to punish, as contempts, rude and contumelious behaviour, breaches of the peace, or any wilful disturbance in its presence.

Whence the necessity for the exercise of the power? It is that the law may be administered fairly and impartially, uninterrupted by any influence which might affect the safety of the parties, or the judge or officers of the court, that the court may have that regard and respect so essential to make the law itself respected, and that the streams of justice may be kept clear and pure.

If the court is scandalized and its integrity impeached, while a cause is pending before it, if the counsel are grossly libeled, and low and obscene terms are applied to them, which may have the effect to intimidate, the consequences must be the same as if direct contempts are offered. The administration of the law is embarrassed and impeded, the passions, often unconsciously, are roused, the rights of parties are endangered, and a calm and dispassionate discussion and investigation of causes is prevented.

The authority to punish for constructive contempts has been recognized by numerous courts, in England and America. I shall merely cite a few cases: *Respublica v. Passmore*, 3 Yeates, 44; *Oswald's Case*, 1 Dallas, 319; *People v. Freer*, 1 Caines, 515;

Tenney's Case, 3 Foster (N. H.), 162; *Hollingsworth v. Duane*, Wall. C. C. U. S., 77; *United States v. Duane*, id., 102.

In *Tenney's Case*, the respondent was interested in a suit brought by his son against one of the defendants in a bill of equity, in which suit the son was unsuccessful, but he was not a party to and had no interest in the suit in equity, and while the bill was pending, he caused copies thereof to be printed and circulated extensively. The bill contained serious charges, and the respondent also said that he could stop the proceedings in equity if one thousand dollars were paid to him.

The conduct and language were out of the presence of the court, and it was held to be a contempt, and calculated to disturb the free course of justice. In conclusion, the court said: "The circulation of such charges, in the absence of proof, by a person unconnected with the questions to be tried, was dishonorable and vindictive in the highest degree, and an unwarrantable interference with the administration of justice."

In *Respublica v. Passmore*, *supra*, the defendant affixed a writing to a board in the exchange room in the city tavern, reflecting upon the parties to the suit, and the court held that the publication of such a paper prejudiced the public mind in a cause depending in court, and was a contempt.

In *Oswald's Case*, the publication in a newspaper, of wanton aspersions upon the character of the opposite party, was ruled to be a contempt, and Chief Justice McKean said, that without the power to punish for contempts no court could possibly exist—"nay, that no contempt could, indeed, be committed against us, we should be so truly contemptible."

In the case of *The People v. Freer*, *supra*, a publication was made in a newspaper in regard to a cause under investigation, and was intended to prejudice the public mind against the court, and to intimidate it in its decision on the motion for a new trial. In the case of *People v. Crowell*, Kent, J., afterwards Chancellor, delivered the opinion of the court, and said that publications scandalizing the courts, or tending unduly to influence or overawe their deliberations, were contempts, which should be punished by attachment, and that it was essential to their dignity of character, their utility and independence that they should possess and exercise such authority.

In *United States v. Duane*, there was a publication in a news-

paper, pending the cause, reflecting upon the court and jury. The court held that it was a contempt, which had a tendency to deter counsel and intimidate the court, if they were susceptible of intimidation.

In the *State v. Morrill*, 16 Ark., 384, a publication was made in a newspaper, while the court was in session, which, in the language of the court seemed "to intimate, by implication, that the court was induced by bribery to make the decision referred to." It was regarded as a contempt, and an imputation upon the purity of the motives of the members of the court while acting officially in a particular case.

In determining the sufficiency of a plea to the jurisdiction of the court, Chief Justice English delivered an able opinion, and held that the right to punish for contempts was inherent in all courts of justice, a part of their life and a necessary incident to the exercise of judicial powers; that the section in the bill of rights, that "every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty," gave the right to any citizen to publish the proceedings and decisions of courts, to comment upon them freely, discuss their correctness, the fitness or unfitness of the judges, and the fidelity with which they perform their public trusts; but not by defamatory publications, to degrade the tribunal, destroy public confidence in it, and thus dispose the community to set at naught its judgments and decrees.

In the class of constructive contempts, this court has said "would necessarily be included all acts calculated to impede, embarrass or obstruct the court in the administration of justice. Such acts would be considered as done in the presence of the court." *Stuart v. The People*, *supra*.

The power is arbitrary, and should be exercised with prudence and moderation, and only in extreme cases. Indeed, all power is arbitrary; but this furnishes no reason why the silent power of a court should not be awakened to restrain wrong, and to check the attempt to destroy all respect for the law by calumination of its officers, who are the channels by which justice is conveyed to the people.

What is the nature and character of the publication, and what is its tendency and effect?

This court is charged impliedly, if not directly, with bribery

If such was not the intent, words are useless to convey an intent. This court, and the cause pending therein are mentioned, and a new trial predicted, not because the law demands it, but because immunity from crime can be purchased.

It is said that the money had been contributed. This court, at the time, had the control of the cause, and the power to condemn or acquit; and the charge is that it is so corrupt and debased that it will sell justice for a paltry sum, violate a solemn oath, and release a murderer in wilful disregard of the law.

The legislature is then threatened with bitter censure, unless it provides the most summary procedure in trials for murder, and immediate hanging upon conviction.

Wherefore this public outcry against the criminal law? The answer is given, because the courts are now completely in the control of corrupt members of the legal profession. This is defamatory of the court, as well as the profession, and particularly so of the counsel for the accused, an officer of this court of pure character and high standing.

Can it be possible that a court has power to punish at discretion, and in a summary mode, by fine and imprisonment, slight and trivial offenses in its presence, merely temporary in their effects, an undulation of the quiet surface, and cannot punish for calumny and defamation and impeachment of its integrity, which tend to embarrass its action, destroy its independence, rob it of its good name, intimidate it, if timidity is an element in its constitution, and eventually to degrade it?

Has it no power to protect counsel from the effect of publications, which are calculated to deter them from a bold and manly defense of suitors, for fear of the denunciation of the press?

No man who values character more than riches, and who has a consciousness of his own integrity, can aspire to be a member of a court; no lawyer, imbued with the spirit of an honorable profession, and who appreciates his own manhood, will practice in a court when infamous and damning charges are published against them while a cause is pending, and there is no power to stay the calumny and afford protection by summary punishment.

The exercise of the power to punish for such publications is not an abridgement of the freedom of the press. It can be no restraint upon the right to examine the proceedings of every branch of the government.

It is no restriction upon the privilege, secured to every citizen in the Bill of Rights, that "every person may freely speak, write and publish, on all subjects, being responsible for the abuse of that liberty."

These rights have well defined limits. They are correlative, and must respect other rights. They are not independent of all control. Even liberty is not unlicensed, but is regulated by law. The press can be free, in the broadest sense of the term, without blackening character or having a license to defame. Every man may freely speak and write without indulgence in slander or libel. Every branch of the government may be freely examined without false accusation, and unjust charges of crime against those who hold positions of trust. The truth is never to be feared, and may always be spoken and written; but the utterance of wilful and deliberate falsehood, disguise it as you may with good intentions, is dangerous and cowardly, and deserves punishment and reprobation. It is an abuse of the rights guarantied by the constitution.

This court has not the power, nor the desire to arrogate it, to direct or control the press, in its legitimate sphere. Freedom of speech, and of the press, should be most jealously guarded. The utmost latitude should be allowed for fair, full and free review of the entire action of the courts. Just criticism may assail the opinions, expose their fallacy, and warn of their errors. The opinions of courts are not solemn edicts, to be blindly assented to, but are subject to calm and fearless stricture. The good taste and severity of the language—the weapons to be employed—whether reason or ridicule, must be determined by the writer. In popular governments, neither the public action nor official opinion of persons, in positions of trust, can be exempt from condemnation by the press, or in the assemblages of the people. But there must be toleration, for "error of opinion shall always be tolerated, when reason is left free to combat it." This character of animadversion should never be regarded as a contempt of court.

The freedom of the press, however, is fully protected, without licensing libel and ribaldry, and charges of corruption and bribery, against courts and their officers. Whatever the intent may be, though it may mitigate the offense, it cannot lessen the injury to character, or undo the mischief.

The right of the respondents must be conceded to examine the proceedings of every department of the government, not in passion and with abuse, but with fair and manly argument. Good will then result, error may be exposed, and reason will resume its sway. Then the press will be a power and a blessing, and will exercise its constitutional right.

The publication under consideration is not criticism. Its tendency is to embarrass the court. It charges crime, when none exists. It is scandalous, abusive, passionate in tone and spirit. It impugns the integrity of this court, and classes the counsel of the accused amongst the most degraded of the profession. Its false charges of crime are calculated to disturb the mind of the pure man, and unfit him for the discharge of arduous and responsible duties. Abuse can never convince. Passion must rouse passion.

The tendency must be to impair the usefulness of this court, deprive it of respect, obstruct it in the due administration of the law, and if silently submitted to, so debase it as to present it a spectacle beneath even contempt.

I concur in the issuance of the attachment.

SCOTT, J., dissenting: Having been opposed in the first instance to issuing the rule to show cause, I am of opinion, after more mature reflection, that the rule should not be made absolute.

Whatever may be the true construction of the article set out in the information, the respondents have both denied under oath, any purpose in its publication to obstruct or influence the administration of the law, or any intention to reflect upon the integrity of any member of the court, and this, it seems to me, is all that they ought to be required to do. No public good can possibly result from pressing the matter further. Independently of the disclaimer on the part of the respondents, I am unable to perceive how the article in question could in any manner affect, hinder or obstruct the administration of the law in this court. The newspaper in which the paragraph was printed was published in a city distant from the one where the court is now holding its sessions, and it was not thrust upon the attention of the court by the respondents or any one else. It is unlike the objectionable article in the case of *Stuart v. The People*, 3 Scam., 397, which

was published in the city where an important trial was pending before a jury, and which, with some propriety, could be said to be a constructive contempt, committed in the presence of the court. If it is anything more than simply an unjust criticism on the court in reference to a cause then pending, the most unfavorable view that can be taken is, that it is a constructive contempt, and as such, it could not directly or indirectly affect the administration of justice in an appellate court. I should be very unwilling to admit that it could have any such effect. It seems to me that the majority of the court have attached an undue importance to a mere newspaper paragraph.

From an early period in the history of our jurisprudence, the power has been conceded to all courts of general jurisdiction to punish, in a summary manner, contempts committed in their presence. The right rests on the necessity that was found to exist to enable courts to administer the law without interruption or improper interference, and to maintain their own dignity. So indispensable is this power that its just exercise, so far as it may be necessary for the due protection of the courts, has never been questioned.

The legislature has provided that the supreme and circuit courts may punish parties for contempts committed against them while sitting, and it is a very grave question whether it was not the intention, by implication at least, to limit the power of courts to punish for contempts to such as should be committed in their presence. I am not, however, unmindful that courts of the highest authority in this country and in England have assumed jurisdiction to punish, in a summary manner and on their own motion, what are termed constructive contempts—such an one as is sought to be set forth in the information filed.

The exercise of this extraordinary power by a court of final jurisdiction has ever been regarded as of questionable authority, and one liable to great abuse, and which might become dangerous to the liberty of the citizen. Its exercise by the courts in this country has been tolerated rather than conceded by constitutional provisions or legislative enactments. The objection proceeds on the ground that the court ought not to assume to be the judge of the offense against itself, and of the mode and measure of redress, where the law has provided, and where in the very nature of things there can be no mode of reviewing the ac-

tion of the court in the premises. There has always existed jealousy against the exercise of arbitrary power by any tribunal supposed to be derived from common law sources, and not expressly granted by constitutions or laws enacted by legislative assemblies. It must be conceded that public journals have the right to criticise freely the acts of all public officers — executive, legislative and judicial. It is a constitutional privilege that even the legislature cannot abridge. Such criticism should always be just, and with a view to promote the public good. In case the conduct of any public officer is wilfully corrupt, no measure of condemnation can be too severe, but when the misconduct is simply an honest error of judgment, the condemnation ought to be mingled with charity.

The public have a profound interest in the good name and fame of their courts of justice, and especially of the courts of last resort. Everything that affects the well being of organized society, the rights of property and the liberty of the citizen, is submitted to their final decision. The confidence of the public in the judiciary should not be wantonly impaired. It is all important to the due and efficient administration of justice, that the courts of last resort should possess, in a full measure, the entire confidence of the people whose laws they administer. All good citizens will admit that he who wilfully and wantonly assails the courts by groundless accusations, and thereby weakens the public confidence in them, commits a great wrong, not alone against the courts, but against the people of the commonwealth. But who shall furnish the remedy? Shall the court that is assailed, or shall the legislative power of the state? In my judgment, there are many and politic reasons why the legislative power alone should provide the remedy, if any shall be found to be necessary. It is far better that the judges of the courts should endure unjust criticism, and even slanderous accusations, than to interpose, of their own motion, to redress the offense against themselves, where the offense complained of is not committed in their immediate presence. It is a matter of public history, that it has been the policy of the press in this country to uphold and maintain the authority and dignity of the courts. If a contrary policy should ever be inaugurated in this state, to such an extent as to seriously affect the reputation or impair the efficiency of the courts in the administration of the law, I have no

doubt that the legislature will afford an appropriate remedy. It was said by this court, in the case of *Stuart v. The People*, *supra*, that respect to the courts cannot be compelled; it is the voluntary tribute of the public to worth, virtue and intelligence and while they are found on the judgment seat, so long and no longer will they retain the public confidence.

SHELDON, J., also dissenting: I do not concur in the action of the majority of the court, in this case. I am opposed to the exercise of the power of punishing for constructive contempt where the alleged contempt consists merely in personal aspersions upon a court, contained in a newspaper article, especially in the case of an appellate court, where I am unwilling to admit that newspaper paragraphs affect, or are calculated to embarrass the administration of justice.

BREESE, J., also dissented from the action of the majority of the court, in entering the rule and awarding the attachment.

The writ of attachment awarded by the court was issued on the 6th day of November, 1872, in the following form:

"STATE OF ILLINOIS — *In the Supreme Court* — Northern Grand Division — September Term, A. D. 1872.

"*The People of the State of Illinois to the Sheriff of LaSalle County* — GREETING: Whereas, it has been made to appear that *Charles L. Wilson* and *Andrew Shuman* have printed and published an article which has been adjudged by the said court now in session at Ottawa, in the aforesaid county and state, to have been printed and published in contempt of said court while so in session, as aforesaid:

"We, therefore, command you, that you attach the said *Charles L. Wilson* and *Andrew Shuman*, so as to have their bodies forthwith before our said supreme court, at Ottawa, in the county aforesaid, to answer the said court of the said contempt, by them lately committed against it, as it is said, and further, to do and receive what our said court shall, in that behalf, consider. Hereof fail not, and have you then and there this writ.

"Witness, Charles B. Lawrence, Chief Justice of said court, and the seal thereof, at Ottawa, this 6th day of November, in the year of our Lord one thousand eight hundred and seventy-two. W. M. TAYLOR, *Clerk of the Supreme Court.*"

On the 8th day of November the respondents appeared in court, in answer to the writ of attachment, whereupon the chief justice pronounced the following sentence:

You, *Charles L. Wilson* and *Andrew Shuman*, are before this court under an attachment for contempt, in consequence of an article relating to a cause pending in this court, and published in a newspaper of which you, *Charles L. Wilson*, are the proprietor, and you, *Andrew Shuman*, are the chief editor.

In the opinion delivered by the majority of this court, when passing upon your return to the rule, to show cause why an attachment should not issue against you, we have said all that we desire to say in regard to the character of the publication, and the injury which such publications tend to cause to the administration of justice. It was then held that your answer showed no reason why an attachment should not issue. It now only remains to impose upon you a penalty for the offense. It is in the power of the court, in cases of this character, to punish by both fine and imprisonment. We have, however, no desire to inflict a severe penalty. Our object will be accomplished if we show to the press that it cannot be permitted to attempt to influence the decision of cases pending in the court. We are not unmindful of the fact that neither of you wrote the objectionable article, and that you, *Charles L. Wilson*, did not see it before its publication. We shall impose upon you only a moderate fine, as we cannot believe you are likely to commit similar offenses in the future.

You, *Charles L. Wilson*, are adjudged to pay a fine of \$100, and you, *Andrew Shuman*, are adjudged to pay a fine of \$200, to the treasurer of this state. You are also adjudged to pay the costs of this proceeding. The fine will be paid to the clerk of this court, who is directed to remit the same immediately to the state treasurer, and procure his receipt therefor, to be filed among the papers in this case.

The sheriff will hold the respondents in his custody until the fine and costs are paid to the clerk.

NOTE. — The action of the supreme court of Illinois, in this case, in punishing the proprietor of a newspaper for an article that was published in his paper without his knowledge or privity, must be based on the same principle that has been applied by the English courts in cases of criminal prosecutions for libel. In *Walford's Speeches of Lord Erskine* (vol. 2, p. 339), the doctrine is thus stated: "As the law stands at present (A. D. 1810), from a current of authorities, it is

undoubtedly not competent to any judge trying an indictment or information for a libel, to give any other direction to a jury than that a publication, though proved to have been sold by a servant, *without knowledge of the master*, involves the master in all the criminal consequences of the publication." This was the law, but before the present case, the reporter has not met with any American case in which this doctrine has been sanctioned or applied, and it is believed that the American courts will be slow to adopt it. The true doctrine would seem to be, that in every case where one is sought to be made criminally responsible for the act or default of another, as in the case of master and servant and husband and wife, that proof of the act and proof of the relation should never be more than *prima facie* evidence of guilt, leaving it open to the master or husband to show that the criminal act was not done by any consent, connivance, procurement, or made possible by any criminal negligence, on his part, and this when established should constitute a good defense. Further than this the law ought not to go. The ancient doctrine in criminal prosecutions for libel was only one instance of the wicked and pernicious consequences of "presumptions of law" as a means of proof in criminal cases. On the subject of the criminal responsibility of the master for the act of the servant in criminal prosecutions for libel, the eloquent language of Lord Erskine in *Cuthill's Case* is worthy of consideration: "In the case of a civil action, throughout the whole range of civil injuries the master is always *civiliter* answerable for the act of his servant or agent; and accident or neglect can therefore be no answer to a plaintiff complaining of a consequential wrong. If the driver of a public carriage maliciously overturns another upon the road, whilst the proprietor is asleep in his bed at a hundred miles distant, the party injuring must unquestionably pay the damages to a farthing; but though such malicious servant might also be indicted, and suffer an infamous judgment, *could the master also become the object of such a prosecution?* CERTAINLY NOT. In the same manner, partners in trade are *civilly* answerable for bills drawn by one another, or by their agents, drawing them by procuration, though fraudulently and in abuse of their trusts. But if the partner commits a fraud by forgery or fictitious indorsements, so as to subject himself to death, or other punishment by indictment, *could the other partners* be indicted? To answer such a question here, would be folly; because it not only answers itself in the *negative*, but exposes to scorn every argument which would confound indictments with civil actions. *WHY* then is *printing and publishing* to be an exception to every other human act? *WHY* is a man to be answerable *criminaliter* for the crime of his servant in this instance, more than in all other cases? *WHY* is a man who happens to have published a libel under circumstances of mere accident, or if you will, from actual carelessness or negligence, but *without criminal purpose*, to be subjected to an infamous punishment, and harangued from a British bench, as if he were the malignant author of that which it was confessed before the court delivering the sentence, that he *never had seen or heard of?* As far indeed as damages go, the principle is intelligible and universal; but as it establishes a crime, and inflicts a punishment which affects character and imposes disgrace, it is shocking to humanity and insulting to common sense. The Court of King's Bench, since I have been at the bar (very long, I admit, before the noble lord presided in it, but under the administration of a truly great judge), pronounced the infamous judgment of the pillory on a most respectable proprietor of a newspaper, for a libel on the Russian ambassador, copied too, out of another paper, but which I myself showed to the court by the affidavit of his physician, appeared

in the *first* as well as in the *second* paper, whilst the defendant was on his sick bed in the country, *delirious in a fever*. I believe that affidavit is still on the files of the court. I have thought of it often — I have dreamed of it, and started from my sleep — sunk back to sleep, and started from it again. The painful recollection of it I shall die with. How is this vindicated? From the *supposed* necessity of the case."

Following are additional cases on constructive contempts by publications reflecting on courts, and a fuller statement of some of the cases cited in the opinion:

"A person had been committed for perjury by the judge, who tried an ejectment in which he was claimant, and in which the issue was the question of his identity with a certain baronet, alleged by the defendants to be dead. The jury, during the defendants' case, had expressed themselves satisfied that the claimant was not the person; he swore he was, and he elected to be non-suited. The grand jury at the central criminal court found true bills against him for perjury and forgery; the prosecution removed the indictments by *certiorari* into the court of Queen's Bench; and it had been fixed, upon application of the attorney general, that the trial should take place at bar next Easter term. The defendant and his friends, amongst whom were two members of parliament and one barrister at law, had held meetings for the purpose of obtaining money for the defense at the coming trial, and remarks had been made by the defendant and the three friends mentioned, imputing perjury and conspiracy to the witnesses for the defense at the trial of the ejectment, and prejudice and partiality to Lord Chief Justice COCKBURN, who, they said, had proved himself unfit to preside at the trial of the indictments.

"They also asserted the innocence of the defendant, and the injustice of his treatment. On a summons against the members of parliament to show cause why they should not be punished for contempt, it was *held* that the trial of these indictments was a proceeding of the court then pending; that although the remarks at the meetings might be the subjects of a criminal information, yet the parties who made them might also be prosecuted summarily for contempt of court; that these remarks indicated an attempt by means of vituperation, to deter the lord chief justice from taking any part in the trial, and also by attacks on the witnesses themselves to influence the public mind and prejudice the jury; that they unwarrantably interfered with the even and ordinary course of justice; that it was no excuse that the motive or purpose for which the meetings were held was justifiable, nor that the attempt to interfere with the course of justice was ineffectual; that the proceedings were a gross contempt of court, and that it was the duty of the court to put a stop to them." *Reg. v. Onslow*, 12 Cox Crim. Cases.

In the matter of *B. F. Moore et al.*, 63 N. C., 397, it appeared that the respondents, who were attorneys of the supreme court, had signed and published a protest against the alleged political partisanship of the judges of the supreme court of North Carolina during the election campaign of 1868. The protest contained this language: "Never before have we seen the judges of the supreme court singly or *en masse* moved from that becoming propriety so indispensable to secure the respect of the people, and, throwing aside the ermine, rush into the mad contest of politics under the excitement of drums and flags. From the unerring lessons of the past, we are assured that a judge who openly and publicly displays his political party zeal renders himself unfit to hold the 'balance of justice,' and that whenever an occasion may offer to serve his fellow-partisans, he will yield to the temptation, and the 'waving balance' will shake. It is a natural weakness in man, that he who warmly and publicly identifies himself with

a political party, will be tempted to uphold the party which upholds him, and all experiences teaches us that a partisan judge cannot be safely trusted to settle the great principles of a political constitution, while he reads and studies the book of its laws under the banners of a party." The court held that this publication was a contempt of court, which they had an inherent and constitutional right to punish summarily, by striking the respondents from the roll of attorneys, although it was admitted by the court that the statute of North Carolina, providing for the punishment of contempts of court, did not embrace this case.

In *State v. Morrill*, 16 Ark., 384, which was a proceeding to punish, as for a contempt, the publisher of a newspaper for an article reflecting on the court, the respondent pleaded to the jurisdiction of the court. The plea set up that the publication was not embraced within the statute regulating the punishment of contempts, and that the court could punish no act as a contempt except such as are enumerated in the statute. To this plea a demurrer was interposed and the court sustained the demurrer. The report of the case does not contain the article which was the subject of the proceeding. Its character and the circumstances under which it was published can only be gathered from the following language used by Chief Justice ENGLISH in delivering the opinion of the court:

"One Ellis was lodged in the jail of Pulaski county, on a charge of murder, failing to give the bail required by the committing magistrate. The office of the circuit judge of the district in which the offense was committed being at the time vacant, ELLIS applied to the supreme court for a *habeas corpus*, alleging that the bail required by the magistrate was excessive; that he was unable to give it, and praying the court to inquire into the matter, and reduce the amount of bail, etc. The writ was accordingly issued, the cause heard on the 20th of February, upon the testimony produced, and the court being of the opinion that the offense was a bailable homicide, ordered the prisoner to be let to bail upon a recognizance, in the sum of \$5,000, with good and sufficient security for his appearance at the ensuing term of the Prairie circuit court, where the offense was cognizable. Failing to furnish the bail required, the prisoner was remanded to jail, with the privilege of being brought before the court again to enter into the recognizance, should he procure the requisite securities, which he failed to do.

"On the 24th of March following, and while the court was still in session, the defendant, it appears, from motives which it is of no consequence to conjecture, published the article in question, directly in reference to the decision of the court, upon the application of Ellis.

"The language of the article would seem to intimate, by implication, that the court was induced by *bribery* to make the decision referred to. It is not an attack upon the private character or conduct of the members of the court, as men, but seems to be an imputation against the purity of their motives while acting officially, as a court, in a specified case. Had the publication referred to them as individuals, or been confined to a legitimate discussion of the correctness of their decisions, in that or any other case, no notice would have been taken of it officially."

The court conceded that the Arkansas statute for the punishment of contempts did not extend to the publication in question, but nevertheless held that the court had a constitutional power to punish as for a contempt, for the publication of a libel, made during a term of the court in reference to a case then decided, imputing to the court, officially, *bribery* in making the decision—such power being inherent in courts of justice, springing into existence upon their creation, as a necessary incident to the exercise of the power conferred upon them.

It was further held that the legislature had no power to abridge or abrogate this inherent, constitutional power of the court, and that the article in question was a contempt of court.

In *Respublica v. Oswald*, 1 Dall., 343, the respondent, who was defendant in a libel suit then pending in the court, published an address which was intended to prejudice the public mind upon the merits of the cause, and insinuated that from the prejudices of the judges against him, arising out of former trials, he did not stand a chance of a fair trial.

A rule was issued to show cause why an attachment should not issue to punish him as for a contempt. On a motion to discharge the rule, the court say: "Upon the whole, we consider the publication in question as having the tendency which has been ascribed to it, that of prejudicing the public (a part of whom must hereafter be summoned as jurors), with respect to the merits of a cause depending in this court, and of corrupting the administration of justice. We are, therefore, unanimously of opinion, on the *first* point, that it amounts to a contempt.

"It only remains then to consider whether the offense is punishable in the way that the present motion has proposed.

"It is certain that the proceeding by *attachment* is as old as the law itself, and no act of the legislature, or section of the constitution, has interposed to alter or suspend it. Besides the sections which have been already read from the constitution, there is another section which declares that "trials by jury shall be as *heretofore*;" and surely it cannot be contended that the offense with which the defendant is now charged was *heretofore* tried by that tribunal. If a man commits an outrage in the face of the court, what is there to be tried? What further evidence can be necessary to convict him of the offense than the actual view of the judges? A man has been compelled to enter into security for his good behavior, for giving the lie in the presence of the judges in *Westminster Hall*. On the present occasion, is not the proof from the inspection of the paper as full and satisfactory as any that can be offered? And whether that publication amounts to a contempt or not is a point of law, which after all, it is the province of the judges, and not the jury, to determine. Being a contempt, if it is not punished immediately, how shall the mischief be corrected? Leave it to the customary forms of a trial by jury, and the cause may be continued long in suspense, while the party perseveres in his misconduct. The injurious consequences might then be justly imputed to the court for refusing to exercise their legal powers in preventing them. For these reasons, we have no doubt of the competency of our jurisdiction; and we think that justice and propriety call upon us to proceed by *attachment*."

"The publication of a paper to prejudice the public mind, in a cause depending, is a contempt, if it manifestly refers to the cause, though it does not expressly appear upon the face of the writing." *Bayard v. Passmore*, 3 Yeates, 438.

On the other hand, in *Ex parte Hickey*, 12 Miss., 751, it was held that a newspaper article, published during the session of a court, pending the trial before that court of a prisoner indicted for murder, charging the judge presiding over the court with being an abettor of the murderer, is not a contempt of court, but a mere libel upon the functionary. The court also held that the statute providing for the punishment of contempt, was a limitation upon the power of the courts, and that nothing could be punished as a contempt except what came within the terms of the statute, and that a power of punishing a newspaper publication, as a constructive contempt, would be unconstitutional.

STATE *vs.* FOSTER.

(37 Iowa, 404.)

EMBEZZLEMENT: *What is sufficient employment — Newly discovered evidence.*

Under an indictment founded on the ordinary statute against embezzlement, evidence that the prosecutor gave the prisoner a watch which the prisoner, as agent for the prosecutor, was to trade for a wagon when he could find a suitable opportunity, and for which service the prosecutor was to pay the prisoner \$5.00, shows a sufficient employment to make the prisoner guilty of embezzlement in converting the watch to his own use.

On the trial of an indictment for embezzlement, the state gave evidence that the watch embezzled was worth \$95.00. The prisoner gave no evidence on this point. After the trial, it was discovered that the watch was not worth over \$10 or \$15. No negligence appearing on the part of the prisoner or his counsel, it was *held* that a motion for a new trial on this ground was improperly overruled.

BECK, C. J. 1. The second count of the indictment upon which the defendant was convicted charges that he, being "the servant and agent of one P. B. Furlong, and being over the age of sixteen years, did by virtue of his said employment, have, receive, and take into his possession and under his control, one watch, of the value of \$95, the property of P. B. Furlong, his employer, and the said watch without the consent of his said employer, did feloniously embezzle and fraudulently convert to his own use." The statute upon which this indictment was found, is as follows:

"If any officer, agent, clerk or servant of any incorporated company; or if any clerk, agent or servant of a copartnership; or of (if) any person over the age of sixteen years, embezzle and fraudulently convert to his own use, or take and secrete, with intent to convert to his own use, without the consent of his employer or master, any money or property of another, which has come to his possession, or is under his care by virtue of such employment, he is guilty of larceny, and shall be punished accordingly." Rev. Stat., § 4244. There was evidence tending to prove that, by an agreement between Furlong and the defendant, the latter undertook, in consideration of \$5, to be paid him by the former, to trade a watch, the property of the former, for a wagon. Defendant was to find some one owning a wagon, who

would trade it for a watch, and make the exchange for Furlong. Under this agreement the watch was delivered to the defendant, who failed to make the trade, and converted the watch to his own use. The court instructed the jury upon this evidence as follows:

"7. If you find that Furlong and the accused made an agreement whereby the accused contracted to receive the watch and trade it for a two horse wagon for Furlong, for which he was to receive a compensation of \$5, this is sufficient to sustain the averments that the defendant was in the employment of said Furlong, and that he received the watch by virtue of this employment."

It is insisted that this instruction and the view of the case upon which it is based are erroneous, inasmuch as no such relation, or employment, is shown to have existed between the accused and Furlong, as is a necessary ingredient of the crime of embezzlement, under the statute.

It is insisted, in a very able argument by defendant's counsel, that the transaction between the parties, disclosed by the evidence and contemplated by the instructions of the court, constitutes an ordinary bailment, and could not, therefore, be the foundation of the crime of embezzlement.

It may be suggested, before proceeding to the discussion of the question presented, that the authorities cited, and others we have been able to consult, throw little light upon the subject, from the fact that they interpret, and apply to, statutes not entirely similar to the law of this state under which the indictment was found. Upon the construction of this enactment depends the solution of the question before us. Its language necessary to be interpreted, correcting the obvious typographical error found therein, is this: "If any person over the age of sixteen years embezzle and fraudulently convert to his own use, without the consent of his employer or master any money or property of another which has come to his possession, or is under his care by virtue of his employment, he is guilty," etc.

The words indicating the relation that must exist between the accused and another, which is a necessary ingredient of the offense, are "employer," "master," "employment." We will, without notice of the word "master," consider the term "employer" and "employment." They are not of the technical

language of the law or of any science or pursuit, and must therefore be construed according to the context and the approved usage of the language. Rev. Stat., § 29, p. 2.

The words are defined as follows: *Employment*—"the act of employing or using. 2. Occupation; business. 3. Agency or service for another or for the public. *Employer*—one who employs; one who engages or keeps in service."

The verb "employ" is defined as follows, when used with a human being either as its subject or object: "To engage in one's service; to use as an agent or substitute in transacting business; to commission and intrust with the management of one's affairs." Webster.

It will be seen from the definition of these words that the statute contemplates the relation of agency, a contract for services, whereby the accused is bound to do or perform something in connection with the property embezzled, and that by virtue of such relation he acquired possession thereof. It by no means appears that the idea of bailment or bailee is excluded from these definitions, but without following the thought or relying upon it, we will inquire whether the evidence establishes a relation of agency or service existing between the accused and Furlong, and whether such relation is contemplated by the instructions above quoted. We think it is in each. The watch was received under an agreement that the accused was to act for Furlong in making a contract of sale of the property, *i. e.*, exchanging the watch for a wagon. Can it be doubted that any proper contract of sale within the scope of the accused's authority would have bound Furlong? Certainly he would have been bound thereby; and one of the ingredients of the transaction creating it a binding contract upon him would have been the relation of agency existing between him and the accused. We conclude that the idea of agency is clearly expressed, both by the language of the indictment and instructions, and the relation is established by the evidence, or rather that there was evidence tending to establish it rendering the instruction relevant and proper, upon which the jury may well have found its existence.

We, therefore, find no error upon this point in the rulings of the court upon the instructions and the motion assailing the indictment, because the facts alleged do not constitute an offense under the statute. See upon this point 2 Whart. Am. Crim.

Law, § 1936; *The People v. Dalton*, 15 Wend., 581; 3, Arch. Crim. Prac. and Pl., 450, 444 and notes.

A motion for a new trial because of newly discovered evidence was overruled. We think it should have been sustained.

Evidence as to the character of the watch and its value, showing it to be worth \$95, was given by the state. No evidence upon this point was introduced by the accused. His own affidavit and that of his counsel, we think, show the fact that they were not in possession at the time of the trial, of the names of any witnesses by whom the evidence on the part of the state, as to the value and character of the property, could have been contradicted. It is shown by the affidavits of these witnesses that the watch is of base metal and only of the value of \$10 or \$15. It does not appear that any fault or negligence can be properly attributed to defendant or his counsel in not introducing the evidence of these or of other witnesses upon the point at the trial; in fact the showing made is such that we must conclude that they were unable, from ignorance of the names of the witnesses, to do so.

The attorney general suggests that the evidence claimed to be newly discovered is but cumulative, on the ground that one of the witnesses of the state does not give as high a description of the character of the watch as the prosecuting witness. But nothing was said by him as to its value, and defendant's counsel, in the exercise of proper prudence, may well have feared to venture upon an attempt to establish a point in the defense by one of the state's witnesses.

The importance of the evidence cannot be questioned, for it is upon a fact which, if established, would reduce the offense from a felony to a misdemeanor.

For the error of the district court in overruling the motion for a new trial, on the ground of newly discovered evidence, the judgment is reversed.

Judgment reversed.

NORM. — Whether or not money or property *delivered* by the owner to another for a particular purpose, and by that other fraudulently converted to his own use, can be said to be money or property *received* "by virtue of an employment," and the fraudulent conversion an embezzlement, may be considered still an open question in most American courts. The English doctrine is, that in such a case, there is no embezzlement, and Bishop seems to consider this the settled law. He says: "Another point is, that the money or other thing must not come into the mas-

ter's possession before it does into the servant's; for if it does, the taking of it, whether delivered to the servant by the master or not, is larceny; but it must come directly from a third person, and not from the master," *i. e.*, to constitute embezzlement. 2 Bish. Crim. Law, § 365, and cases there cited. No American case is cited which bears out this doctrine. On the contrary, as pointed out by Mr. Bishop in succeeding sections, the doctrine in New York and in Alabama is directly the reverse. Thus in *Louenthal's Case*, 32 Ala., 589, it was held that where a draft was delivered by an employer to a clerk which he was to present for acceptance and then return to his employer, and failed to return it, but fraudulently converted it to his own use, he was guilty of embezzlement. So in New York, in *People v. Dalton*, 15 Wend., 581, it was held that where a traveler at an inn handed a money letter to the bar-keeper to mail, and the bar-keeper, instead of mailing it, opened the letter and kept the money, that he was guilty of embezzlement. So in *People v. Nichols*, 3 Park. Crim. Rep., 579; where a quantity of pig iron was delivered to the defendant, a common carrier, to transport by canal from Albany to Buffalo, and on the way, at night, he secretly removed some from the boat, with a felonious intent, he was held to be guilty of embezzlement. In California the difficulties arising out of the English doctrine have been met by a statute which punishes the embezzlement of property *entrusted* to another as well as the embezzlement which comes to his possession by virtue of his employment.

THE QUEEN *vs.* NEGUS.

(2 Cr. Cas. Res., 34.)

EMBEZZLEMENT: "*Clerk or servant*," 24 and 25 Vict., ch. 96, sec. 68.

The prisoner was engaged by the prosecutors to solicit orders for them, and was to be paid by commission on the sums received through his means. He had no authority to receive money; but if any was paid to him he was forthwith to hand it over to his employers. He was at liberty to apply for orders wherever he thought most convenient, but was not to employ himself for any other persons than the prosecutors. Contrary to his duty he applied for payment of a certain sum; having received it, he applied it to his own use, and denied, when asked, that it had been paid to him: *Held*, on the above facts, that the prisoner was not a "clerk or servant" within the meaning of 24 and 25 Vict., ch. 96, sec. 68.

CASE stated by the assistant judge of Middlesex Sessions.

The prisoner was indicted for embezzling £17, as clerk and servant to Roape and others.

The prisoner was engaged by the prosecutors to solicit orders for them, and he was to be paid by a commission on the sums received through his means. He had no authority to receive money; but if any was paid to him he was forthwith to hand it over to his employers. He was at liberty to apply for orders

wherever he thought most convenient, but was not to employ himself for any other persons than the prosecutors. Contrary to his duty, he applied for payment of the above sum, and having received it he applied it to his own use, and denied, when asked, that it had been paid to him.

The prisoner's counsel contended that the prisoner was not a clerk or servant within the statute, but the learned judge refused to stop the case, and directed the jury to find him guilty.

The question was whether, upon the facts stated, the prisoner was a clerk or servant, and as such rightly convicted of embezzlement. See 24 and 25 Vict., ch. 96, sec. 68, *ante*, p. 29.

No counsel appeared for the prisoner.

F. F. Lewis, for the prosecution: *Reg. v. Bowers*, 2 Law Rep., 1 C. C., 41, somewhat resembles the present case, and is an authority in favor of the prisoner; but there the commission agent carried on a retail trade for himself at a shop, and so could not be deemed a clerk or servant of the merchant who supplied coal for him to sell.

[BOVILL, C. J. And here the prisoner might apply for orders wherever he thought most convenient.]

So might the traveler in *Reg. v. Baily*, 12 Cox Cr. C., 56; he was nevertheless held to be clerk or servant of his employers.

[BLACKBURN, J. For he was under their control, having to devote his whole time to the service.]

The stipulation that the prisoner was not to employ himself for any other persons than the prosecutors shows that they had control over him.

[BOVILL, C. J. Not at all. He might go away to amuse himself wherever he liked.]

Reg. v. Tite, Leigh & Cave Cr. C.; *Reg. v. Turner*, 11 Cox Cr. C., 551, were also cited.

BOVILL, C. J. The only question submitted to us is whether, on the facts stated, the prisoner was a "clerk or servant," and, as such, rightly convicted of embezzlement. The learned assistant judge of the court directed the jury to find the prisoner guilty, subject to this point being raised.

Generally speaking, I should say that the question whether a person is a clerk or servant depends on so many considerations that it is one to be left to the jury, as it is extremely difficult for

the court to come to a satisfactory conclusion upon such a matter. Much depends on the nature of the occupation in which the individual is engaged, and the kind of employment. But we have to see if there was enough evidence to show that the prisoner here was a clerk or servant. I think that that fact is not sufficiently made out. What is a test as to the relationship of master and servant? A test used in many cases is, to ascertain whether the prisoner was bound to obey the orders of his employer, so as to be under his employer's control, and on the case stated, there does not seem sufficient to show that he was subject to his employer's orders, and bound to devote his time as they should direct. Although under this engagement with them, it appears he was still at liberty to take orders, or to abstain from doing so, and the masters had no power to control them in that respect. Where there is a salary, that raises a presumption that the person receiving it is bound to devote his time to the service, but when money is paid by commission, a difficulty arises, although the relationship may still exist where commission is paid, as in ordinary cases of a traveler, and in *Reg. v. Tite, Leigh & Cave Cr. C.*, 29; 30 L. J. (M. C.), 142, and the other case cited. But in either case there may be no such control, and then the relationship does not exist. All the authorities referred to seem to show that it is not necessary that there should be a payment by salary—for commission will do—nor that the whole time should be employed, nor that the employment should be permanent—for it may be only occasional, or in a single instance—if, at the time, the prisoner is engaged as servant. The facts before us do not make out what the prosecution was bound to prove, viz., that the prisoner was clerk or servant.

BRAMWELL, B. This conviction ought to be quashed, unless we can see that the prisoner on the facts stated must have been clerk or servant, within the meaning of the act of Parliament. I am of opinion that on the facts we cannot do so. Looking to principle, we find that the statute was intended to apply, not to cases where a man is a mere agent, but where the relationship of master and servant, in the popular sense of the term, may be said to exist. ERLE, C. J., in *Reg. v. Bowers*, Law Rep. 1 C. C. R., 41, at p. 45, says the cases decide "that a person who is employed to get orders and receive money, but who is at liberty to

get those orders and receive that money when and where he thinks proper, is not a clerk or servant within the meaning of the statute." I think that is perfectly good law, consistent with all the authorities, and, applied here, it shows that the prisoner was not a clerk or servant within the definition there given.

BLACKBURN, J. I am of the same opinion. The test is very much this, viz., whether the person charged is under the control and bound to obey the orders of his master. He may be so without being bound to devote his whole time to this service; but if bound to devote his whole time to it, that would be very strong evidence of his being under control. This case differs in nothing from the ordinary one of a commission agency, except in the sole statement that the prisoner was not to work for others. But I do not think that circumstance, by itself alone, enables us to say that he was a servant of the prosecutors.

ARCHIBALD, J., concurred.

HONYMAN, J. I agree. The question was not left to the jury to decide, and I cannot satisfy myself that the relationship of master and servant existed between the prosecutors and the prisoner. It does not appear that the prisoner was bound to obey every single lawful order. Possibly the masters might tell him to go somewhere, and he might justly refuse.

Conviction quashed.

Attorneys for the prosecution, *Allen & Son.*

QUEEN vs. FOULKES.

(2 Cr. Cas., Res. 150.)

EMBEZZLEMENT: *Clerk or servant.*

The prisoner's father was clerk to a local board, and held other appointments. The prisoner lived with his father, and assisted him in his office, and in the business of the board. In his father's absence, the prisoner acted for him at the meetings of the board, and when present, he assisted him. The prisoner was not appointed or paid by the board; and there was no evidence that he received any salary from his father. The board having occasion to raise a loan on mortgage, the prisoner managed the business for his father, and at his father's office received the money from the mortgagees, and appropriated a part of it to his own use: *Held*, that there was evidence that the prisoner was a clerk or servant to his father, or employed as clerk or servant, and was guilty of embezzlement from him.

CASE stated by QUAIN, J.

The prisoner was tried at the last assizes for Shropshire, for embezzlement. The indictment on which the prisoner was tried contained four counts. On the first count he was charged that on the 22d day of September, 1871, he was employed as clerk to the local board of Whitchurch and Dodington, and received 600*l.* on account of said local board, and did steal 100*l.*, parcel of the said 600*l.*, the moneys of the said local board, his employers. On the second count, that on the 14th of February, 1872, he embezzled the sum of 100*l.*, the moneys of the said local board, his employers. On the third count, that on the 22d day of September, 1871, he embezzled the sum of 100*l.*, parcel of a sum of 600*l.*, the moneys of Charles Foulkes, his master. On the fourth count, that on the 14th day of February, 1872, he embezzled the sum of 100*l.*, the moneys of Charles Foulkes, his master. Charles Foulkes, the father of the prisoner, was appointed clerk to the local board of Whitchurch and Dodington, at a salary of 40*l.* a year, and continued to hold such appointment till his death. Charles Foulkes held various other appointments. The business of the board was transacted at his office, the board paying him a rent for the use of it. The prisoner lived with his father, and assisted him in his office, and in conducting the business of the local board. In the absence of his father, prisoner acted for him at the meetings of the local board, and assisted his father when present. Prisoner was not appointed or paid by the local board. There was no evidence that prisoner was paid any salary by his father. The only evidence was that he in fact assisted his father as clerk, or servant, or assistant in his office as above described. In the year 1871, and while Charles Foulkes was clerk to the local board as above mentioned, the board had occasion to raise a loan for the purpose of building a market. The money was raised on mortgages of the local rates. The prisoner managed the business of the loan for his father. He filled in the usual form of mortgage, and either he or his father obtained the proper signatures of the members of the local board. The course of business was, that prisoner received, at his father's office, the money from the mortgagees, in exchange for the mortgages, and paid it into the Whitchurch and Ellesmere Bank (who were the treasurers of the board), to an account called the "market account." In the course of his employment, he embezzled and appropriated to

his own use the sum of money mentioned in the indictment. It was objected by the counsel for the prisoner, that he could not be convicted of the first two counts of the indictment, as he was not a clerk or servant of the board, nor employed by the board in that or any other capacity; and that he could not be convicted on the third or fourth count, as there was no evidence that he was the clerk or servant of his father, or was employed by him in that capacity, beyond the fact that he assisted his father, and that the moneys embezzled were not the moneys of Charles Foulkes, but of the local board. The prisoner was convicted and sentenced, but the learned judge respited the execution of the sentence till after the decision of the court in the case. The question for the court was, whether, upon the above facts, the prisoner could be properly convicted on any of the counts of the indictment. The following cases were cited before the learned judge: *Reg. v. Negus*, Law Rep. 2 C. C., 34; *Reg. v. Beaumont*, Dears. Cr. C., 270; 23 L. J. (M. C.), 54; *Reg. v. Tyree*, Law Rep. 1 C. C., 177, and the 11 and 12 Vict., ch. 63, sec. 138, was referred to as authorizing the board (the district being a non-corporation district) to allege that the property was the property of their clerk.

Rose, for the prisoner. The prisoner could not properly be convicted of embezzlement. To constitute embezzlement by a person "being a clerk, or servant, or being employed for the purpose or in the capacity of a clerk or servant,"¹ there must be a contract of service of some kind, either expressed or implied. In the present case there was none, for the prisoner was in no sense in the employment of the local board, and the services he rendered to his father were mere voluntary services, not rendered in pursuance of any contract. He cited *Rex v. Burton*, 1 Moo. Cr. C., 237; *Rex v. Hettleton*, 1 Moo. Cr. C., 259; *Reg. v. Bowers*, Law Rep., 1 C. C., 41; *Reg. v. Tyree*, Law Rep., 1 C. C., 177; *Reg. v. Turner*, 11 Cox Cr. C., 551; *Reg. v. Collum*, Law Rep., 2, C. C., 28; *Reg. v. Negus*, Law Rep., 2 C. C., 34.

No counsel appeared for the prosecution.

¹ By 24 and 25 Vict., ch. 96, sec. 63: "Whosoever being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, shall fraudulently embezzle any chattel, money, or valuable security which shall be delivered to or received or taken into possession by him for or in the name or on the account of his master or employer * * * shall be deemed to have feloniously stolen the same from his master or employer." * * *

COCKBURN, C. J. I think there was evidence on which the jury might well find that the prisoner either was a clerk or servant. The father held various offices, and the prisoner, his son, in consequence of his father's illness, or for other reasons, did the duties which the father would otherwise have had to do himself, or to employ a clerk to do. It is true there was no contract binding him to go on doing those duties. But the relation of master and servant may well be terminable at will, and while the prisoner did act, he was a clerk or servant.

The second question is, whether there was an embezzlement. I think there was. The money was to be received by the father, though received for the local board. He was the proper custodian of the money, and the son received it for him. There was, therefore, evidence upon both points.

BRAMWELL, B. I am of the same opinion. If the prisoner had not been the son of the man for whom he acted, and had not lived with him, it is abundantly evident that he would have been a clerk or servant, and would have been entitled to payment upon a *quantum meruit*. Then what difference can his being a son make? It may affect the nature of his remuneration, but nothing else.

With regard to the money, the father might have had to account for it, but he was entitled to receive it from the son, therefore there was an embezzlement.

MELLOR, J. The only difficulty which I can collect that the learned judge felt was, that there was no evidence of an actual contract of employment. But there is clear evidence that in what the prisoner did, he was a clerk or servant.

BRETT, J. The prisoner undertook to do things for his father which a clerk does for his master, and to do them in a way a clerk does them. Now, assuming that there was no contract to go on doing those things, still as long as he did them with his father's agreement, he was bound to do them with the same honesty as a clerk, because he was employed as a clerk.

POLLOCK, B. If it had been necessary to say absolutely that the prisoner was a clerk or servant, I should have hesitated.

But I think the words "employed as clerk or servant" are wider, and that there is evidence to bring the case within them.

Conviction affirmed.

Attorney for prisoner, *G. F. Cook*; for Chandler, *Shrewsbury*.

THE QUEEN vs. CHRISTIAN.

(2 Cr. Cas., Res. 94.)

AGENT: *Misappropriation of money — Direction in writing — 24 and 25 Vict., ch. 96, sec. 75.*

The prisoner, a stock and share dealer, was employed by the prosecutrix to purchase securities for her. He bought in his own name, and received money from her from time to time to cover the amounts he had paid or had to pay for the securities. Such payments were not made against any particular item, but in charges for round sums. On one occasion he wrote to her, "I inclose a contract note for 300*l.* J. bonds, at 112, 336*l.*," and the contract note ran, "Sold to Mrs. S. (the prosecutrix), 300*l.* J., at 112, 336*l.*," and was signed by the prisoner. The prosecutrix wrote in reply: "I have just received your note and contract note for three J. shares, and inclose a cheque for 336*l.* in payment." The prisoner never paid for the bonds, but in violation of good faith, appropriated to his own use the proceeds of the cheque: *Held*, that the letter of the prosecutrix was a direction in writing to apply the proceeds of the cheque to pay for the bonds, if they had still to be paid for, within the meaning of 24 and 25 Vict., ch. 96, sec. 75; and that the prisoner was rightly convicted of a misdemeanor under that section.

CASE stated by HONYMAN, J.

The prisoner was tried at the October session of the central criminal court, 1873, for converting to his own use or benefit the proceeds of a cheque for 336*l.*, with which he had been intrusted as the agent of Mary Ann Spooner, contrary to the statute, 24 and 25 Vict., ch. 96, sec. 75.¹

¹ By 24 and 25 Vict., ch. 96, sec. 75: "Whosoever having been intrusted, either solely or jointly with any other person, as a banker, merchant, broker, attorney or other agent, with any money or security for the payment of money, with any direction in writing to apply, pay or deliver such money or security, or any part thereof respectively, or the proceeds, or any part of the proceeds, of such security for any purpose, or to any person specified in such direction, shall, in violation of good faith, and contrary to the terms of such direction, in anywise convert to his own use or benefit, or the use or benefit of any person other than the person by whom he shall have been so intrusted, such money, security or proceeds, or any part thereof respectively, . . . shall be guilty of a misdemeanor, . . ."

The prisoner was a stock and share dealer, carrying on business at 11 Royal Exchange. In the year 1872 a Mrs. Spooner, a widow, was introduced to the prisoner, and the prisoner offered to make any investments for her that she might wish, and told her that out of respect to her late husband, he would not make her any charge for so doing. Between this time and the 1st of November, 1872, the prisoner purchased for her at different times, a variety of securities, amounting in the whole to 1,326*l.*, 17*s.*, 6*d.*, for doing which he made no charge; and, on the other hand, Mrs. Spooner from time to time made payments to the prisoner, amounting in the whole to 1,886*l.*, 2*s.*, 6*d.*, such payments not being made specifically against any particular item, but in cheques in round sums.

On the 12th of November, 1872, the prisoner made the following suggestion to Mrs. Spooner:

"11 ROYAL EXCHANGE, LONDON, E. C.,
"November 12, 1872.

"AMENDED SCHEME OF INVESTMENT.

"Argentine, 6 per cent.,	Price (say)	97 (2 bonds).....	194 <i>l.</i>
"Austrian Silver Rentcs, 5 per cent., "	67	"	134 <i>l.</i>
"Chilian, 6 per cent..... "	103	"	206 <i>l.</i>
"Chilian, 7 per cent..... "	108 (1 bond).....	108 <i>l.</i>	
"Japanese, 9 per cent..... "	111 (2 bonds).....	222 <i>l.</i>	
"United States, 5-20, 6 per cent..... "	93 (5 bonds).....	465 <i>l.</i>	
			1,829 <i>l.</i>

"Producing 8*9*/₁₀₀ per annum.

"DEAR MADAM: The above is an amended scheme of investment, which I trust you will find in accordance with your wishes.

"No doubt it will be better to take advantage of present lower quotations, wherever prices have been affected by late events, and I will proceed to act immediately on receiving your instructions to that effect.

"I remain, dear madam, yours truly,

"Mrs. Spooner, etc., etc.

Y. CHRISTIAN."

Mrs. Spooner assented to this, and on the 14th of November, 1872, the prisoner purchased on her account, but in his own name, from one Wrenn, a jobber on the Stock Exchange, the three sets of securities mentioned in the contract note of the 14th of November, 1872, hereinafter set out, and sent to Mrs. Spooner the following letter and contract note:

"11 ROYAL EXCHANGE, LONDON, E. C.,

"November 14, 1872.

"DEAR MADAM: I have much pleasure in inclosing contract note for

"2007. Argentine... ..	68 @ 96
"2007. Austrian Sil.....	@ 65½
"\$2,500, 5-20, 1867.....	@ 93½

which I have every reason to believe will pay you very well, taking into consideration their stability. I hope to get the Japanese to-morrow. Railways—Great Northern, Great Western and Caledonia—are all expected to give good dividends, and I think you will do well to procure a few. The markets are on the rise in consequence of the bank rate not having been altered.

"I beg to remain, dear madam, yours most obediently,

"(Signed.)

Y. CHRISTIAN.

"Mrs. SPOONER."

"LONDON, November 14, 1872.

"Sold to Mrs. SPOONER.

L. s. d.

"2007. Argentine, 1868, @ 96, net.....	192	0	0
--	-----	---	---

"2007. Austrian Silver @ 65½.....	131	0	0
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"\$2,500, 5-20, 1867 @ 93½.....	525	18	9
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[REV.]

"Y. CHRISTIAN,

[STP.]

"Stock and share dealer, 11 Royal Exchange, E. C.

"Bankers—Bank of England."

The prices mentioned in this note were the same as those agreed between the prisoner and the vendor of the bonds, etc. The prisoner did not disclose his principal, but said he was buying for a widow lady.

On the 15th of November, 1872, Mrs. Spooner sent to the prisoner the following statement of account between herself and the prisoner:

STATEMENT OF ACCOUNT.

	L.		L.	s.	d.	L.	s.	d.
Feb. 3. 200 New South Wales Govt. Stk., @ 104½,	209	5	0	....	..	..	..	..
Feb. 3. 200 Victoria 6 per cent. Govt. Stk., @								
114½.....	228	15	0	....	..	..	..	..
Apr. 10. 25 Western Gas (A. B. or C.), @ 17¾...	443	15	0	....	..	..	..	..
Apr. 10. 7 Imperial Gas (12½% issue), 10% pd. @								
4 p. m.....	98	0	2	....	..	..	..	..
Apr. 10. 8 Reuters Tel., @ 11 ¼, Stamp Fee...	90	10	0	....	..	..	..	..
Apr. 17. 13 Imperial Gas (12½% issue), 10% pd. @								
4 p. m.....	182	0	0	....	..	..	..	..
Stamp and Fee.....	1	2	6	....	..	..	..	..

	<i>L.</i>	<i>L.</i>	<i>s.</i>	<i>d.</i>	<i>L.</i>	<i>s.</i>	<i>d.</i>
Apr. 17.	Stamp and Fee, 77. Imp. Gas, Apr. 10, ...	12	6				
Apr. 10.	25 Western Gas, Apr. 10.....	2	7	6			
Apr. 22.	5 Imperial Gas, @ 14.....	70	0	0			
	Stamp and Fee.....	0	10	0			
Nov. 14.	200 Argentine, 1868, @ 96.....	192	0	0			
	200 Austrian Silver, @ 65½.....	131	0	0			
	\$2,500 5-20, 1867, @ 93½.....	525	18	9			
		<u>2,175</u>	<u>16</u>	<u>3</u>			
Feb. 3.	By cheque.....				500	0	0
Apr. 10.	By “.....				600	0	0
Apr. 11.	By “.....				100	0	0
Apr. 18.	By “.....				186	0	0
Apr. 23.	By “.....				500	0	0
					<u>1,886</u>	<u>2</u>	<u>6</u>
	Balance.....				282	13	9
					<u>2,175</u>	<u>16</u>	<u>3</u>

Accompanied by the following letter:

“2 PEMBERTON TERRACE, ST. JOHN’S PARK,

“*Nov. 15th, 1872.*

“MY DEAR SIR:—I inclose a statement of account, with a cheque for the balance, which I hope you will find correct. When I know the amount of the Japanese, I will immediately forward you a cheque for the same. With my best thanks for all your kindness,

I am, yours faithfully,

“Y. CHRISTIAN, Esq. (Signed) M. A. SPOONER.”

And also by cheque for 289*l.* 13*s.* 9*d.*, payable to the prisoner or order, and the prisoner, on the 16th of November, acknowledged the receipt of the cheque and account, and obtained payment of the former.

On the 27th of November, 1872, the prisoner wrote the following letter to Mrs. Spooner:

Y. CHRISTIAN,
Stock and Share Dealer.
Bankers—
Bank of England.

“11 ROYAL EXCHANGE,
“LONDON, E. C.,
“*November 27th, 1872.*

“DEAR MADAM:—I inclose a contract note for 300*l.*, Japanese bonds at 112—336*l.*

“This 300*l.* was offered to me in one lot, and I thought myself fortunate in securing them for you, and had no doubt of your ratifying what I have done. These Japanese securities are really

a first-rate investment, and will pay 3 per cent. I have got them at the lowest price of the day, and indeed, my apparent dilatoriness in the matter has been caused solely by my anxiety to get them cheaper, if I could. Yours truly,

"Mrs. SPOONER, etc. (Signed) Y. CHRISTIAN."

And inclosed is the following contract note:

"LONDON, *Nov. 27th, 1872.*

"Sold to Mrs. M. A. Spooner 300*l.*, Japanese @ 112 — 336*l.* 0*s.* 0*d.*

"Stock and Share Dealer, [Revenue]

"11 Royal Exchange, E. C. Y. CHRISTIAN.

"Bankers — Bank of England. [Stamp.]"

The prisoner had on the same day bought in his own name, from Mr. Wrenn, three Japanese bonds at 112.

It was not true that the 300*l.* was offered to the prisoner in one lot; but the prisoner asked Mr. Wrenn for these bonds.

On the same day Mrs. Spooner sent to the prisoner the following letter:

"2 PEMBERTON TERRACE, ST. JOHN'S PARK,
Nov. 27th, 1872.

"MY DEAR SIR: — I have just received your note and contract note for three Japan shares, and inclose a cheque for 336*l.* in payment.

"I am much obliged to you, and perfectly satisfied that you have purchased the three shares for me.

"My son Frank will be bearer of this, and I shall feel obliged if you will kindly give him any information you can about the 'Nicholas Railway,' and the 'Share Investment Trust.'

"Again thanking you, in haste,

"Believe me, yours faithfully,
(Signed) "M. A. SPOONER."

And also a cheque for 336*l.*, payable to the prisoner or order, and the prisoner received and indorsed the cheque, and received the proceeds thereof.

On the 29th of November, 1872, the prisoner wrote the following letter to Mrs. Spooner:

Y. CHRISTIAN,
Stock and Share Dealer.

Bankers —
Bank of England.

"11 ROYAL EXCHANGE,
"LONDON, E. C.,

"*November 29th, 1872.*

"DEAR MADAM: — I have to acknowledge the receipt of your

cheque for 336*l.*, value for three Japanese bonds, which I shall have the pleasure to forward you immediately on their being delivered. I now inclose two 100*l.* Argentine bonds, of the Six per cent. Loan of 1868, Nos. B, 12,309 and 1572; and two bonds for 1000 florins each, of the Austrian Currency Loan, Nos. 495,402 and 495,403.

"With reference to the latter portion of your note, I will at once say, I do not recommend either the Nicholas Railway or the Share Investment Trust. But turning the matter over, I consider, for safety and profit, a sum laid out on Great Western or North London Railway Shares will do good. For that purpose, however, we must watch the market, and take advantage of a day or week when prices have declined. But, of course, I shall do nothing till I have your sanction for proceeding.

"Yours truly,

"Mrs. SPOONER, etc. (Signed) Y. CHRISTIAN."

Mrs. Spooner never received either the 2500 United States bonds, or the Japanese, though she repeatedly applied to the prisoner for them; and the prisoner, on one occasion, told her that the broker or jobber was in his debt, and that the broker or jobber knew that when he delivered the bonds the prisoner would deduct from the price the amount of such debt. On the 8th of August, 1873, the prisoner offered Mrs. Spooner a composition, and informed her he was filing a petition for liquidation. Ultimately, the United States bonds and the Japanese bonds, having been carried over from time to time, by the order of the prisoner, without the knowledge of Mrs. Spooner, were sold by the orders of the prisoner.

The prisoner never paid the person from whom he bought the United States and Japanese bonds, for the same, and the cheques for 289*l.* 13*s.* 9*d.*, and 336*l.*, were paid into the prisoner's account, and the proceeds of such cheques applied by the prisoner to his own purposes.

At the close of the case for the prosecution, it was contended on behalf of the prisoner, that Mrs. Spooner's letter of the 27th of November, 1872, did not constitute a sufficient direction in writing to apply, pay or deliver the cheque or its proceeds for any purpose or to any person specified in such direction, within the meaning of the statute.

The learned judge left the case to the jury, but reserved the

aforesaid question for the opinion of the court of criminal appeal.

The jury found the prisoner guilty. The question for the opinion of the court of criminal appeal was, whether Mrs. Spooner's letter of the 27th of November, 1872, coupled with the prisoner's letter of that date, and the contract note for the Japanese bonds was, under all the circumstances of the case, a sufficient direction in writing within the statute.

Metcalf, Q. C. (*Collins* with him), for the prisoner. The section under which the prisoner was indicted was passed originally to meet the case of *Rex v. Walsh* (R. & R.), Cr. C., 215, and it applies only to a case in which there is a direction to apply the security itself, or the specific moneys received as its proceeds, in a particular way. But here the course of dealing between the parties shows that the prisoner was at liberty to pay any cheque received from the prosecutrix into his own bankers. The cheque was in fact sent to him to indemnify him for any payment he had made, or had rendered himself liable to make, for the prosecutrix. This is the natural meaning of the words "in payment." He also cited *Reg. v. Golde*, 2 Moo. & Rob., 425.

Meade, for the prosecution, was not called upon.

KELLY, C. B. By the terms of the statute, "whosoever having been intrusted as a banker, merchant, broker, attorney, or other agent, with any money, or security for the payment of money, with any direction in writing to apply, pay, or deliver such money or security, or any part thereof, or the proceeds, or any part of the proceeds of such security, for any purpose, or to any person specified in such direction, shall, in violation of good faith, and contrary to the terms of such direction, convert to his own use such money, security or proceeds, or any part thereof," is guilty of a misdemeanor. And the only question in the present case is, whether the instructions contained in the prosecutrix's letter of the 27th of November were a "direction" within the meaning of the act, and if so, what the meaning of the direction was. In my opinion, that letter, when fairly construed, does amount to a direction, and such a direction that the prisoner might rightly be said to have converted the proceeds of the cheque to his own use, contrary to its terms.

The prisoner had been in the habit of purchasing securities for

the prosecutrix, and receiving cheques from her in respect of them. It does not very clearly appear whether in all instances he purchased in his own name, nor is it very material. Then, in his letter to her of the 27th of November, he says: "I inclose a contract note for 300*l*. Japanese bonds, at 112, 336*l*." And the contract note inclosed was in this form: "Sold to Mrs. M. A. Spooner 300*l*. Japanese at 112, 336*l*," and was signed by the prisoner. This contract note and the letter in which it was inclosed are both ambiguous. They might mean that the prisoner had bought the bonds and had got them, so that there was nothing to do but to hand them over to the prosecutrix on payment by her of the price, and in this case, her letter in reply, "I have just received your note and contract note for three Japan shares, and inclose a cheque for 336*l* in payment. I am perfectly satisfied that you have purchased the three shares for me," might well mean, "Whereas, you have bought and paid for the bonds, you will receive this cheque in payment to yourself." But the prisoner's letter might also mean that he had bought the bonds in his own name, but that they were not yet handed over because not paid for; so that it was necessary to get money to pay for them. And if this had been explicitly stated, then the prosecutrix's letter in reply would have meant, "I send you a cheque which you will either hand over to the seller of the bonds, or obtain payment of it, and hand the proceeds or your own cheque in lieu of them to the seller." And upon this view the offense charged would clearly have been committed.

If, then, either construction of the letter is fairly possible, must we not read it in the alternative, as saying, "You do not state whether you have paid for the bonds; if you have done so, keep the cheque, if not, then apply the money in payment to the seller, so that you may get the bonds, and hand them over to me?" And so reading the letter, and applying it to the state of facts that really existed and were known to the prisoner, it became a direction to apply the cheque or its proceeds in payment for the bonds, and the prisoner was, therefore, rightly convicted.

BLACKBURN, J. I am of the same opinion. Before turning to the words of the statute, look at the facts. The prisoner, being an agent within the meaning of the statute (for as to that no question is reserved), consents to act on the terms contained in

his first letter of the 12th November. He accordingly receives instructions to buy, and various securities are bought. It seems immaterial to consider whether any privity of contract was established between the prosecutrix and the sellers. There is at any rate no doubt that the prisoner must have made himself personally liable to them, and therefore he would have a right, after paying for shares, if he did pay, to refuse to hand them over till he was repaid. He would also have a right to require cash beforehand, so as to keep him out of advances. In this state of things, he writes his letter of the 27th November, and the prosecutrix her answer of the same date. Now, looking at the facts and writing down what seems to have been her meaning as to the cheque, I have no doubt as to what it must be: "Inasmuch as there is a sum of 336*l.* which I have to pay to get the Japanese bonds, get the proceeds of the cheque in the way most convenient to yourself and pay for the bonds." I think if the prisoner had handed over the cheque itself, or handed over the actual notes received for it, he would have been within his instructions. I think he would have been so also, if he had paid it into his own bank *bona fide*, for the purpose of meeting a cheque of his own given to the seller, although a hundred things might intervene to prevent the cheque being actually met. I think, then, that the prosecutrix's letter was a direction to apply the cheque or its proceeds to getting the bonds for her free from any lien or claim on the part of the seller.

Turning, then, to the statute, and applying its words to the facts of the case, we find that the prisoner was an agent and he received a direction in writing to apply the cheque or its proceeds to a certain purpose. And the jury have found that in violation of good faith, and contrary to that direction, he applied them to his own use. I have no doubt, therefore, that he was rightly convicted.

LUSH, J. The only question reserved is, whether Mrs. Spooner's letter of the 27th November, 1872, coupled with the prisoner's letter of that date, and the contract note for the Japanese bonds, was, under all the circumstances of the case, a sufficient direction in writing within the statute. And looking at the course of dealing between the parties, I think the natural meaning of the prosecutrix's letter is: "If you have not paid for the

bonds, use the cheque or its proceeds to pay," and therefore the prisoner was rightly convicted.

POLLOCK, B., and HONYMAN, J., concurred.

Conviction affirmed.

Attorneys for prosecution, *Wilkinson & Son*; attorney for prisoner, *R. King*.

CORY vs. STATE.

55 Ga., 236.)

EMBEZZLEMENT: *Foreign corporation—Mistake in transcript of indictment.*

A statute against embezzlement from "any corporate body in this state" does not extend to or include foreign corporations doing business in the state without authority of law.

The transcript of a count in an indictment before the supreme court apparently showing that the embezzlement was charged as done "with" instead of "without" the consent of the owner, the court must regard the count as fatally defective.

JACKSON, J. The defendant was indicted as cashier of the branch office of the Freedman's Saving and Trust Company, in Atlanta, Georgia, for the offense of embezzlement in secreting and stealing over \$8,000 of money deposited in said branch office, and the indictment was framed on section 4421 of the Code. The question for our review is, whether the cashier of the branch office of said company in Atlanta is subject to the penalties and punishment prescribed in that section of the code, and the answer to that question depends upon the answer to this: was that branch bank or branch office a corporate body in this state in the sense of the statute?

1, 2. The Freedman's Saving and Trust Company is a corporation chartered by congress and located in the city of Washington. The charter gives it no power to establish a branch anywhere. No act of congress, outside of its charter, gives it such power, nor has the legislature of Georgia granted it the franchise to locate a branch for the transaction of its business within the limits of this state. Its existence as a corporation, created by congress and located in the city of Washington, will be recognized by our courts; but its existence as a corporate body, located any-

where in Georgia, must depend upon the power granted in its charter by congress, or some other constitutional act of congress, or some statute of Georgia. We have been cited to no such law, and we know of none. It is not the policy of the state to encourage the location in our midst of the branch offices of foreign corporations, and the criminal statutes should not be so enlarged by construction as to embrace such branches located here without authority of law. Section 421 of the Code was designed to protect our own corporate bodies, chartered by our state, and doing business here under the authority of this state in the exercise of franchise granted by it, and to punish the officers of such corporations for embezzling the funds thereof. The section actually puts such corporations upon an equality with the public departments of the state government, and of the counties, towns and cities of the state, and imposes upon the officers of all alike the same punishment, thus throwing the ægis of its protection around all its corporations as around its counties, towns, cities, and the various departments of its own government. It reads thus: "Any officer, servant, or other person employed in any public department, station or office of government of this state, or in any county, town or city of this state, or in any bank or other corporate body in this state, or any president, director or stockholder of any bank, or other corporate body in this state, who shall embezzle," etc. Now can it be seriously contended that the legislature meant to include in this section a corporate body in this state exercising franchises here without her authority, and without the sanction of any law, state or federal? Did she mean to protect the exercise of franchises within her limits, which no law making power recognized by her ever granted, and to place such franchises thus illegally exercised upon an equality with those granted by herself and upon an equality, too, with her own departments of the state government? We cannot think so; and if she did not so mean in the section of the code quoted, and on which the indictment is framed, the defendant was certainly convicted on this count without authority of law. It is vain to argue that the change of the words "of this state" when applied to the departments of government and to the counties, towns and cities in the section to the words "in this state" when applied to the corporate bodies has any significance. Wherever the banks are elsewhere referred to in

this division of the code, they are described as banks in this state, and in such connection as to make it unmistakable that the legislature meant banks chartered by this state. See Code, secs. 4426, 4427. It is a fundamental principle of the common law that penal statutes should be construed strictly. It is scarcely necessary to invoke this rule of construction here. It would require an extremely liberal construction to bring the officer of a corporate body illegally located in the state within the purview of this statute.

3, 4. But there is a second count in the indictment, and the punishment under the second is the same as under the first count; it is therefore said that the verdict of guilty, being general, may be predicated upon either count. That may be so, and as we recognize the Freedman's Saving and Trust Company as an artificial person living in the city of Washington, and some of whose property may have got into Georgia, and somebody entrusted with it here may have stolen it, and as this second count is framed upon section 4422 of the Code, which punishes any bailee who thus steals after a trust, we do not see why this defendant could not be punished under the facts proven in this case under that section. We regret, therefore, that on examining the transcript of the record, we find that this count, as it appears there, is bad, it being alleged that the fraudulent conversion of the money was made *with* the consent of the owner. Of course no crime is charged in such a count, and there can be no legal conviction upon it. It is said that the clerk, in copying the bill of indictment, made a mistake and wrote "with" when he should have written "without the consent of the owner." This may or may not be true. It has not been verified to us in the only way it can legally be done, by the suggestion of a diminution of the record on or before the calling of the case. Code, section 4282, rule 9. Our only course is to adhere to the law, and to rule on principle. It may sometimes work seeming injustice; a departure from it would open the flood-gates of speculation, and unsettle the entire practice of the court. In this case any wrong done can be but temporary; the party can be tried again, and if found guilty on the second count properly framed, he can be punished according to law.

Let the judgment be reversed, and a new trial granted.

EX PARTE JOHN WHITE.

(49 Cal., 433.)

EXTRADITION.

Fugitives from justice.

The governor of this state has no authority to surrender a fugitive who has committed a crime in another state, unless judicial proceedings have been commenced against him for the crime in the state in which it was committed.

Arrest of fugitives from justice.

A person cannot be arrested here for a crime committed in another state, unless a prosecution has been commenced, and is pending against him for the alleged crime in the state having jurisdiction of the offense.

Constitutionality of law concerning fugitives from justice.

The court say, without passing authoritatively on the point, that no reason is perceived why a law allowing fugitives from justice fleeing from another state to be arrested here and delivered up to the authorities of the state having jurisdiction of the offense, is not constitutional.

ON the 18th day of January, 1875, a warrant was issued by the chief justice of the supreme court, for the arrest of the petitioner White. The warrant was issued on an affidavit of Daniel Coffey, which alleged that, on or about the 1st day of December, 1874, at the city of Boston, state of Massachusetts, White stole three gold watches, of the value of \$300, and that, to escape punishment, he fled from the state of Massachusetts, and had taken refuge in the state of California.

The other facts are stated in the opinion.

CROCKETT, J. The petitioner has been brought before us on a writ of *habeas corpus*, and it appears from the return of the chief of police, that he is held under a warrant of arrest issued by a magistrate having authority to issue such writs. It further appears that there was presented to the magistrate, before and at the time of issuing the warrant, an affidavit made in this state, to the effect that the petitioner had committed the crime of grand larceny in the commonwealth of Massachusetts, and is a fugitive from justice from that state. But it was not shown, by the affidavit or otherwise, that a prosecution is pending or has ever been instituted in Massachusetts against the petitioner for the alleged offense.

Section 1548 of the Penal Code provides that "a person charged in any state of the United States, with treason, felony, or other

crime, who flees from justice, and is found in this state, must, on demand of the executive authority of the state from which he fled, "be delivered up by the governor of this state." Under this section, it is evident the governor has no authority to surrender a fugitive, unless he has been "charged" with crime in the state from which he fled. A prosecution must have been instituted there, before the governor can act. Section 1549 provides that "a magistrate may issue a warrant for the apprehension of a person so charged, who flees from justice, and is found in this state," and the seven next preceding sections provide what steps shall be taken for the detention of the fugitive until a requisition shall be made for his surrender by the proper authorities of the state from which he fled.

The first point for consideration is, whether this case comes within the provisions of the statute, and we are convinced it does not. It was not intended that a person might be arrested here upon an affidavit or information charging him with the commission of a crime in another state, when no prosecution has been commenced there, and may never be. He is not a fugitive from justice in the sense of the statute, unless, at the time of his arrest, there be a pending prosecution against him for the alleged crime, in the state having jurisdiction of the offense. Section 1550 tends strongly to support this view when it provides that at the examination before the committing magistrate, "an exemplified copy of an indictment found, or other judicial proceedings had against him in the state in which he is charged to have committed the offense, may be received as evidence before the magistrate." The statute contemplates a case in which a prosecution is pending in another state and the fugitive is found in this state, and may escape punishment unless he shall be detained until sufficient time shall have elapsed to procure and forward a requisition for his surrender. But, as already stated, it is not applicable to a case in which no prosecution is pending in the state having jurisdiction of the offense. This view of the law renders it unnecessary for us to decide whether these provisions of the penal code are unconstitutional; but without pronouncing an authoritative opinion on the point, it may not be improper for us to say that no reason occurs to us, and none has been suggested at the argument, why it is not competent for the legislature to provide for the arrest and detention of a fugitive from justice

until his surrender shall be demanded in accordance with the constitution and laws of the United States.

Ordered that the prisoner be discharged from custody.

WALLACE, C. J., and McKINSLEY, J., concurred specially in the judgment.

EARP *vs.* STATE.

(55 Ga., 136.)

EVIDENCE: *Confessions.*

Where an officer promised respondent, a girl of fourteen, that if she would tell, she should not be hurt, and she thereupon confessed her guilt, it was *held* that the confession was inadmissible, as not having been made voluntarily.

Where a confession which is inadmissible because not voluntarily made is admitted without objection, it is nevertheless the duty of the court to exclude the confession from the consideration of the jury by his charge, if so requested.

JACKSON, J. Cass Earp, the defendant, is a negro girl, some fourteen years old. She was charged and convicted of murder, in throwing a little colored child, two years old, into the river. The child was found dead some week or so afterwards, lower down the river, in a fish trap. The evidence was purely circumstantial, and hardly sufficient to authorize a conviction without the aid of defendant's confessions of guilt. Those confessions were, that she threw the child into the river, but they were reluctantly made by her, and before she made them she said: "If I tell you, won't you hurt me?" to which the reply of the constable was, "No, you shan't be hurt; I came here to arrest you, and you shan't be hurt." This promise was repeated to her upon her hesitating and asking the question again, and then and only then, did she make the confession. The confession went to the jury without objection, and her counsel requested the court to charge, "that in order to make her confessions evidence against her, it must appear to the satisfaction of the jury that such confessions were made voluntarily, without being induced by another, by the slightest hope of benefit, or the remotest fear of injury." The court refused so to charge, and this was the main ground of the motion for new trial, which was refused, and error is assigned

thereon. The Code declares, "to make a confession admissible, it must have been made voluntarily, without being induced by another, by the slightest hope of benefit, or remotest fear of injury." The request is, therefore, in the very language of the code, and should have been given to the jury, unless the defendant forfeited her right to the charge by the failure of the counsel to object to the confession, or to move to rule it out. The court below put his refusal upon this ground, and the naked question is, Should a conviction for murder stand upon illegal evidence because it went to the jury without objection, when the court's attention was called to it, and he was requested to charge the law thereon, and wholly failed to do so? We think that it should not stand, but that the unhappy and doubtless guilty girl, should have another chance for her life, and if convicted, should be convicted according to law.

A motion to rule out the evidence would have been the safer and better practice; but if admitted, we think the law should go to the jury with it, that it might have only the weight to which it is entitled. The girl here evidently hoped that she would make something by her confession, for the great man of the company, in her eyes, the constable, assured her that she should not be hurt, after she had expressed her apprehensions that they would hurt her. Besides, some of the witnesses heard the promise of the constable that she should not be hurt, and others did not, and the testimony of the latter was in before it was certain that such hopes were held out to induce the confession, and in such case the counsel might well prefer not to rule out the evidence, as it was already in, but to ask the instructions of the court thereon. At all events, the circumstantial evidence, without the confessions, would scarcely justify the hanging of this defendant; and if her confessions were illegally extorted from her, she ought not to suffer the death penalty. Besides, we think this court has substantially ruled the point in issue. See *Hol-senbake v. The State*, 45 Ga., 47; *Stallings v. The State*, 47 id., 572; and *Nathan Irwin v. The State*, 54 id., 39. These cases leave this no longer an open question in this court. Let the judgment be reversed on the ground that the court erred in not granting the new trial on the ground predicated upon the refusal to charge as requested.

Judgment reversed.

NEWMAN vs. STATE.

(49 Ala., 9.)

EVIDENCE: *Confessions — Disqualification of judge by relationship.*

The person with whom a prisoner had been living for two years said to him, "Tom, this is mighty hard; they have got the dead wood on you and you will be convicted," and at the same time said something about "owning up." The prosecutor said to the prisoner, "You are very young to be in such a difficulty as this; there must have been some one with you who is older, and I, if in your place, would tell who it is; it is not right for you to suffer the whole penalty and let some one who is guiltier go free; it may go lighter with you." *Held*, that confessions made under the influence exerted by this language could not be regarded as voluntary, and are inadmissible. A judge who is related to the prosecutor by marriage is not incompetent to sit in the trial of a criminal case. He is not related to a party.

FROM the Circuit Court of *Henry*. Tried before the Hon. J. McCaleb Wiley.

The indictment in this case charged that the prisoner, "Thomas, *alias* Tom Newman, broke into and entered the store of J. D. Freeman & Co., which said firm was composed of J. D. Freeman and Ephraim Oates, and in which said store merchandise of value was and is kept for use, sale or deposit, with intent to steal." "On the trial," as the bill of exceptions states, "the state introduced J. D. Freeman as a witness, who testified in substance as follows: The firm of J. D. Freeman & Co. is composed of Ephraim Oates and myself. We carry on a family grocery and confectionery in the town of Abbeville, in said county, and keep goods of value for sale in said store. On the morning of the 2d day of May, 1872, I opened and went into the store at the usual time, and on entering, found that the back door had been forced open during the night. I then proceeded to examine the goods, and found that a quantity of cigars, tobacco, coffee, flour, money and other things had been taken therefrom. I estimated that the money, with the value of the goods lost, amounted to about \$35. A few days afterwards, I sued out a warrant against the defendant, and, in company with the sheriff and one J. W. Stokes, went to the house occupied by the defendant, who was then in the employment of said Stokes, and was living in a small house on his place. The sheriff and I entered the defendant's house, and sent said Stokes to the field where he was at work, to bring him to the house. In a short

time they came into the house together, and I told the defendant that I wanted to examine his box, or chest; that I thought he had some of my goods in it. He denied having the goods, and gave us the key to his box or chest. We opened and examined said box, and found it to contain about half a box of cigars and some tobacco, which I at once recognized as a portion of my stock. The sheriff then arrested the defendant under the warrant which he had against him. I then asked the defendant where he got the tobacco and cigars, and he replied that he got the cigars from Mr. Asher and the tobacco from Mr. J. M. Calloway. He was then informed that Mr. Asher had no such cigars and Mr. Calloway no such tobacco, and that he would have to prove that he got the cigars and tobacco from them. I then said to the defendant, 'These cigars and this tobacco are mine; I will identify them, and you had as well own it.' The witness then proceeded to state the confession of defendant, made at the time, and under the above circumstances; to which objection was made by defendant, which objection was overruled, and the defendant excepted. The witness then proceeded to state the following: 'After the above conversation between the defendant and myself, he stated to me that he had got the goods out of my house; that he and his brother, while standing at Kimbrough's well, heard a noise over at the store; that they went over there to see about it, and found the back door of the store open, and he went in and took the cigars and tobacco.' After the above, I told defendant, 'You are very young to be in such a difficulty as this; there must have been some one with you who is older than you, and I, if in your place, would tell who it is; it is not right for you to suffer the whole penalty, and let some one who is guiltier go free; that it might go lighter with him.' The witness then proceeded to state other confessions made by defendant to him at this time, but the court, *ex mero motu*, refused to allow the witness to state such confessions, to which the defendant excepted. The witness then testified, 'I think this conversation took place after the confession hereinbefore set out.'"

The State then introduced said J. W. Stokes as witness, who testified as follows, in substance: "On seeing the defendant in possession of cigars and tobacco, my suspicions were aroused against him, and I thought that he had something to do with, or

knew of the burglary which had been recently committed. The defendant was in my employ at the time, and was living in a small house on my premises. I communicated to J. D. Freeman certain facts relative to some cigars and tobacco which I saw in the defendant's box, and he and the sheriff and myself, after he had procured a warrant for the defendant's arrest, went to the defendant's house. The sheriff and said Freeman went into his house, while I went to the field after him. While coming from the field with him, I told him that Mr. Freeman was at his house, and wanted to examine his box, and see whether he had any of his property; that he suspected him of having some of the goods. Defendant replied that he had nothing belonging to Mr. Freeman, and that he was willing for him to look and see. On arriving at the house, defendant gave up the key to his box; and we found, on examination, that said box contained a lot of cigars and tobacco, which said Freeman identified as his. I then remarked to the defendant, "Tom, this is mighty bad; they have got the dead wood on you, and you will be convicted;" and asked him where he got the cigars and tobacco; to which he replied, that he got the cigars from Mr. Asher, and the tobacco from Mr. Calloway. I then told him that he would have to prove where he got them, and that said Calloway had no such tobacco; and said something to him about owning up. The defendant then stated that he and his brother, while standing at Kimbrough's well, heard a noise, looked over the fence, saw the store door open, went over there, and went in; that he took the cigars and tobacco, and his brother took the money. We then sent said Freeman to obtain a warrant against defendant's brother; and about half an hour after he had left, the sheriff took defendant, and started with him to jail. After we had left the house, and were at the gate, I told defendant that he had been living with me nearly two years; that there was no necessity for him to have stolen the cigars and tobacco, as I had always furnished his tobacco, that we would then separate; that I could have nothing to do with any one who had acted so badly, and, if he had anything to say as to my assisting him in the difficulty, to do so. Defendant then proceeded to confess, that his brother bored the hole, and forced open the door, and he watched for him while this was being done, that they entered the store, and he took the cigars and tobacco, and his brother took the money. The de-

fendant moved the court to exclude this confession; the court overruled the motion, and the defendant excepted.

On cross-examination, said witness testified as follows: "The defendant is a negro boy about eighteen years of age, and of only ordinary intelligence. I was present, and heard the conversation which took place between said Freeman and the defendant. I think the language addressed by said Freeman to defendant, to wit: "You are very young to be in such a difficulty as this; there must have been some one with you who is older, and I, if in your place, would tell who it was; that it was not right for him to suffer the whole penalty, and let some one who is guiltier go free; that it might go lighter with him," was used before defendant had made any confession at all, and before he had acknowledged anything. The defendant then moved the court to exclude such and every confession which had been admitted against him; the motion was overruled, and the defendant excepted.

The witness Freeman stated, on cross-examination "that he had married the niece and grand daughter of the presiding judge," and the defendant thereupon, "by his counsel suggested the incompetency of the judge to try the case, on account of his relationship to one of the parties, and moved to discontinue the trial." The court overruled the motion, and the defendant excepted. After conviction, the defendant renewed his objection to the competency of the presiding judge, and excepted on that ground to the sentence and judgment of the court.

W. C. Outes, for the prisoner.

Ben. Gardner, Attorney General, *contra*.

PECK, C. J. Before any confession can be received in evidence in a criminal case, it must be shown that it was voluntary. 1 Greenl. Ev., § 219. A confession obtained from an accused person, in the custody of his accusers "by the flattery of hope, or the torture of fear, is not, in contemplation of law, voluntary, and should not be received as evidence of guilt, and no credit ought to be given to it. The books are full of examples and instances, showing us in what cases confessions have been held to be inadmissible, as not voluntarily made. Thus, where the constable who arrested the prisoner said to him, "It is no use for you to deny it, for there are the man and boy who will swear they saw,

you do it." So, where the prosecutor said to the prisoner, "Unless you give me a more satisfactory account, I will take you before a magistrate." So, also, where a girl, thirteen years old, was charged with administering poison to her mistress, with intent to murder, and the surgeon in attendance had told her, "It would be better for her to speak the truth," it was held that her confession, thereupon made, was inadmissible. So, again, where the prisoner's superior in the post office said to the prisoner's wife, while her husband was in custody for opening and detaining a letter, "Do not be frightened; I hope nothing will happen to your husband beyond the loss of his situation;" the prisoner's subsequent confession was rejected, it appearing that the wife might have communicated this to the prisoner. These are some of the cases given, in which confessions were rejected on the ground that they were not voluntarily made. 1 Greenl. Ev., § 220, and notes.

Now, comparing the circumstances under which the prisoner's confessions were made with the cases cited, it seems to me his confession must be rejected as involuntary. He must be supposed to have been alarmed by what was said to him, and thereby induced to believe the parties into whose hands he had fallen could and would, by some means, effect his conviction, and that the best thing he could do was to make a confession. This, I think, is clearly to be inferred from what was said to him by the prosecutor and the witness Stokes. After the prisoner's box had been examined, and cigars and tobacco found, which the prosecutor identified, and claimed as belonging to him, the witness Stokes said to the prisoner: "Tom, this is mighty bad; they have got the 'dead wood' on you, and you will be convicted," and, at the same time, said something to him about "owning up." This witness, with whom the prisoner had been living for about two years, also said to prisoner he could have nothing to do with one who had acted so badly, and if he, prisoner, had anything to say as to his assisting him in the difficulty, to do so. The prosecutor, who claimed the articles — the cigars and tobacco found in the prisoner's box — said to him at the same time: "You are very young to be in such a difficulty as this; there must have been some one with you who was older, and I, if in your place, would tell who it was; it is not right for you to suffer the whole penalty, and let some one who is guiltier go free,

that it might go lighter with him." I have no hesitation in saying that confessions obtained under such influences ought not to be regarded as voluntary, and should be rejected. When it is considered that the prisoner is a negro boy, about eighteen years old, of ordinary intelligence, and necessarily ignorant, suddenly arrested and in custody, charged with a grave offense and surrounded by the prosecutor and others, who had been active in procuring his apprehension, no one can understand the extent of the influence that may have been produced on his ignorant mind by what was said to him. Most probably he was induced to believe that, by making a confession, in the language of the prosecutor, "it would go lighter with him." The objection to the admissibility of the prisoner's confessions, obtained under the circumstances disclosed in the bill of exceptions, should have been sustained.

The objection made to the competency of the presiding judge was properly overruled. He was not interested in the cause, nor related to either of the parties. Revised Code, § 635. His relationship to the prosecutor did not affect his competency.

Judgment reversed and remanded.

PEOPLE *vs.* BARRIC.

(49 Cal., 342.)

EVIDENCE OF INCORPORATION: *Confessions — Accomplice.*

On the trial of an indictment for stealing from a corporation, evidence that a company known by the name given in the indictment is a corporation *de facto* doing business is sufficient evidence of incorporation.

Where a prosecuting witness, who testifies to confessions made in the presence of himself and the sheriff, testifies in a preliminary cross-examination that it is possible that something was said about its being better for the prisoner to make a full disclosure, it was *held*, that the confession was inadmissible.

Before confessions made to one in authority can be received in evidence, it must appear affirmatively that they were made voluntarily.

One who purchases stolen goods from a thief, with money furnished by an officer, with a view of bringing the thief to justice, is not an accomplice.

The fact that a defendant did not move for a new trial in the court below will not bar a new trial, on the reversal of an erroneous conviction by the supreme court.

APPEAL from the County Court of *Santa Clara County*.

The case was this: In the county of Santa Clara are exten-

sive mines of quicksilver, which have been worked for many years by the "Quicksilver Mining Company of New York." The defendant was charged in the indictment with having, on the 2d day of February, 1874, stolen ten flasks and three soda bottles containing quicksilver, the property of said corporation. The prosecution, on the trial, called as a witness Charles W. Hinman, who testified that he had lived in Santa Clara county a number of years, and that, while in Mazatlan, Mexico, some two years before the trial, he saw soda bottles, which were manufactured for a man in Santa Clara county, for sale, containing quicksilver, and that he knew the quicksilver must have been stolen. That, on the 5th day of February, 1874, defendant came to him and inquired if he did not want to make a speculation, and informed him that he could sell him quicksilver, and said further: "you are engaged in silver mining in Nevada, and need quicksilver." That the witness encouraged him with hopes that he might buy, but told him he had not got the money to pay for it. That the witness immediately went to the sheriff's office, and informed the sheriff of what had taken place, and it was arranged that the witness should buy the quicksilver, and the sheriff should furnish the money. That the witness had several interviews with the defendant, and agreed to buy the quicksilver at fifty cents per pound. That the defendant delivered it at the witness' place of residence in San José, soon after the first conversation, and told witness that it was stolen, and witness paid him for it with money furnished by the sheriff. It appeared by the testimony of two other men that Barric had hired the guard at the mine to steal the quicksilver for him in the night. It did not appear from the record but what the theft had been committed before Hinman had his first conversation with the defendant. A flask of quicksilver contained $76\frac{1}{2}$ pounds, and it was worth \$1.20 per pound. The flasks were made of iron. The only other testimony was that of Rondel, the superintendent of the mine, who testified that the defendant confessed that he was guilty, in the sheriff's office, to him and the sheriff and his deputy. When Rondel was asked by the prosecution to relate the confession, the attorney for the defendant obtained leave of the court to ask him some preliminary questions, as to whether the confession was voluntary. These questions, and the reply of the witness, are

stated in the opinion. The counsel for the defendant then objected to the confession being received in evidence, because it was obtained under inducements held out by the sheriff. The court overruled the objection. The court charged the jury that a conviction could not be had on the testimony of accomplices alone. The defendant was convicted, and appealed.

Collins & Burt, for the appellant, argued that, excluding the confessions testified to by Rondel, there was no testimony except that of accomplices, contending that Hinman was an accomplice. As to Rondel's testimony, they argued that it should have been excluded, and cited *People v. Jones*, 31 Cal., 567; *People v. Henessy*, 16 Wend., 147; *People v. Badgley*, id., 53; and *Mayor, etc., of N. Y. v. Walker*, 4 E. D. Smith, 258.

They also argued that it was error to admit parol evidence that the company known by the name of the "Quicksilver Mining Company of New York" was doing business as a corporation *de facto* in California, but contended that proof should have been made that the laws of New York allowed corporations to be formed there for quicksilver mining, and that the corporation had an existence there.

Moore, Lanie, Delmas & Leib, for the people, argued that the confession of the defendant was voluntary, and that there was no error in admitting the testimony as to the corporation, and cited *People v. Hughes*, 29 Cal., 257; *People v. Frank*, 28 id., 507; and *People v. Ah Sam*, 41 id., 645.

McKINSTRY, J. Defendant was indicted for feloniously stealing quicksilver, the property of the "Quicksilver Mining Company of New York."

The prosecution proved by the witness Rondel that the company known by the name given in the indictment was a corporation *de facto*, doing business as such. This was sufficient. *People v. Frank*, 28 Cal., 507; *People v. Hughes*, 29 id., 257; *People v. Ah Sam*, 41 id., 645.

The witness Hinman was not an accessory before the fact. It does not appear from the transcript that he knew anything of the alleged crime until after it was committed.

The confession testified to by Rondel, the superintendent of the company, in the sheriff's office, and in the presence of the sheriff and his deputy is to be regarded as if made to the sheriff.

The following is a transcript from the record.

"Q. Did you say to him that it would be better for him to make a full disclosure?

"A. I don't know but that something of that kind might have been said.

"Q. Do you know by whom?

"A. I do not know.

"Q. But by some one of you?

"A. It may have been said.

"Q. Isn't it your impression that some such remark was made to him?

"A. It is possible."

The witness was then permitted to detail the confession notwithstanding the objection of defendant.

"Before any confession can be received in a criminal case, it must be shown that it was voluntary. The course of practice is, to inquire whether the prisoner had been told that it would be better for him to confess, or worse for him if he did not confess, or whether language to that effect had been addressed to him." 1 Greenl. Ev., 219. The court below should have been satisfied that the confession was voluntary; certainly the preliminary testimony was of a nature to excite the gravest suspicion that improper inducements had been held out to elicit it. But the testimony affirmatively established the inadmissibility of evidence of the confession. It would be substituting sound for sense to say that the prosecuting witness did not in effect declare that the sheriff or his deputy, or he himself in their presence and hearing, said to the prisoner, "It will be better for you to make a full disclosure."

The rule is without exception that such a promise made by one in authority will exclude a confession. Public policy absolutely requires the rejection of confessions obtained by means of inducements held out by such persons. It may be true, even in such cases — owing to the variety in character and circumstances — that the promise may not in fact induce the confession. But as it is thought to succeed in a large majority of instances, it is wisely adopted as a rule of law applicable to them all. *Id.*, 222, 223, and cases cited.

We cannot too strongly urge on the district attorneys never to offer evidence of confessions, except it has first been made to

appear that they were made voluntarily. We ought not to be compelled to reverse a judgment because of a violation of so well established a rule of law.

The defendant asks to be finally discharged because he did not move for a new trial in the court below. But the question suggested by this application has been passed upon by this court, and we see no good reason for disturbing the former ruling. *People v. Olwell*, 28 Cal., 456.

Judgment reversed and cause remanded for new trial.

Neither Mr. Justice CROCKETT nor Mr. Justice RHODES expressed an opinion.

STATE *vs.* GRAHAM.

(74 N. C., 646.)

EVIDENCE: *Confession.*

A prisoner, arrested for larceny of growing corn, was compelled by the officer who arrested him to put his foot into a fresh track in the field where the corn was growing. It was *held* proper for the officer to testify as to the correspondence between the prisoner's foot and the track, and that the evidence should not be excluded, because obtained through fear or force.

Confessions obtained through fear or hope are inadmissible, because the fear or hope may so influence the prisoner's mind as to induce him to make false statements. But if independent facts or circumstances are learned through force, fear or hope, evidence of the facts or circumstances is admissible, because the fear or hope operating on the prisoner's mind can have no tendency to distort them.

RODMAN, J. The first exception is, because the judge permitted the officer who had the prisoner in custody to testify that he made the prisoner put his foot in the tracks found in the prosecutor's field, and that his foot fitted the tracks perfectly. It is argued that making the prisoner put his foot in the track was procuring evidence by duress, and the case of *The State v. Jacobs*, 5 Jones, 259, is cited.

The object of all evidence is to elicit the truth. Confessions which are not voluntary, but are made either under the fear of punishment if they are not made, or in the hope of escaping punishment if they are made, are not received as evidence, because experience shows that they are liable to be influenced by

those motives, and cannot be relied on as guides to the truth. But this objection will not apply to evidence of the sort before us. No fears or hopes of the prisoner could produce the resemblance of his track to that found in the corn field. This resemblance was a fact calculated to aid the jury, and fit for their consideration.

Evidence of this sort, called by the civilians "real evidence," is always admissible, and is of greater or less value, according to the circumstances. In *Best on Evidence*, sec. 183, the following instances of its value are given: "In a case of burglary, where the thief gained admittance into the house by opening the window with a pen knife, which was broken in the attempt, and a part of the blade left sticking in the window frame, a broken knife, the fragment of which corresponded with that in the frame, was found in the pocket of the prisoner. So where a man was found killed by a pistol, the wadding in the wound consisted of part of a printed paper, the corresponding part of which was found in the pocket of the prisoner. In another case of murder, a patch on one knee of the prisoner's breeches corresponded with an impression found on the soil, close to the place where the murdered body lay. In a case of robbery, the prosecutor when attacked struck the robber in the face with a key, and a mark of a key with corresponding wards was visible on the face of the prisoner," etc. Similar instances might be cited indefinitely. The exception, however, is that the officer made the prisoner put his foot in the track, in order to test the resemblance. It has been seen that this could not alter the fact of the resemblance, which is the only matter that would have weight as evidence. It has been often held that if a person under duress confesses to having stolen goods and deposited them in a certain place, although his confession of the theft will be rejected, yet evidence that he stated where the goods were will be received, provided the goods were found at the place described. *Reg. v. Gould*, 9 C. & P., 364; *Duffy v. People*, 25 N. Y., 588; *White v. State*, 3 Heisk., 338; *Selidge v. State*, 30 Tex., 60.

The fact of the goods being found in the place described, proves that he knew where they were, and this knowledge is a fact bearing on the question of his guilt, to which the jury is entitled. An officer who arrests a prisoner has a right to take any property which he has about him, which is connected with

the crime charged, or which may be required as evidence. Roscoe Cr. Ev., 211; *R. v. O'Donnell*, 7 C & B., 138 (32 E. C. L. R.); *R. v. Kinzey*, id., 447; *R. v. Burgess*, id., 488; *R. v. Roon-ey*, id., 515.

If an officer who arrests one charged with an offense has no right to make the prisoner show the contents of his pocket, how could the broken knife, or the fragment of paper corresponding with the wadding, have been found. If, when a prisoner is arrested for passing counterfeit money, the contents of his pockets are secured from search, how can it ever appear whether or not he has on his person a large number of similar bills, which, if proved, is certainly evidence of the *scienter*? If an officer sees a pistol projecting from the pocket of a prisoner arrested for a fresh murder, may he not take out the pistol against the prisoner's consent, to see whether it appears to have been recently discharged? Suppose it be a question as to the identity of the prisoner, whether a person whom a witness says he saw commit a murder, and the prisoner appears in court with a veil or a mask over his face, may not the court order its removal in order that the witness may say whether he was the person whom he saw commit the crime?"

Would the robber whose face was marked with the wards of a key have been allowed to conceal his identity by wearing a mask during his trial?

We conceive that these questions admit of but one answer, and that one is consistent with the general practice.

We concur with the judge below, that the officer had a right to take off the boots or shoes of the prisoner and compare them with the tracks in the corn field. And we also agree with him in the opinion that when the prisoner, upon being required by the officer to put his foot in the track, did so, the officer might properly testify as to the result of the comparison thus made. It is unnecessary to say whether or not the officer might have compelled the prisoner to put his foot in the tracks if he had persisted in refusing to do so. The refusal and the result of the comparison made by the officer between the track and the prisoner's shoes would have been competent.

There is no error. Judgment affirmed. Let this opinion be certified.

Judgment affirmed.

STATE vs. SCANLAN.

(58 Mo., 204.)

EVIDENCE: *Question of fact — Capacity of child as witness.*

A girl whom the court by inspection determined to be between nine and ten years old, being offered as a witness, was objected to. Being examined as to her qualifications, she appeared very nervous and frightened, and said she could not tell her age, and did not know the nature or obligation of an oath, or what the consequences would be of swearing falsely. On a re-examination she said she was the daughter of the respondent, knew her prayers, could read some, believed in God, and thought it wrong to tell lies. *Held*, that she was properly received as a witness.

The question of the competency of a witness is a question of fact, to be determined by the trial judge by personal inspection and oral examination, and his decision is not subject to revision.

LEWIS, J. The defendant was convicted of murder in the first degree, committed upon his wife, and sentenced to death. His appeal to this court brings us but one question for review. This appears in the following extract from the bill of exceptions:

"The state then offered as a witness, in behalf of the prosecution, Mamie Scanlan. Upon being thus presented, the defendant objected to her being sworn and examined because of her tender years; whereupon she was examined by the judge respecting her qualifications as a witness; and upon this examination, the child, being much frightened and scarcely able to speak, stated to the judge that she could not tell her age, that she did not know the nature or obligation of an oath, nor what would be the consequences of false swearing. The answers of the child to the questions of the judge were invariably in monosyllables, yes or no, and uttered in a tone scarcely audible. Upon the first examination, the judge refused to have her sworn. Upon a re-examination, however, the court, from inspection of the witness, judged her to be between nine and ten years of age; and having partially recovered from a fright occasioned by surroundings entirely new to her, the judge ascertained from her statements that she was the daughter of the defendant, that she knew her prayers, could read some, believed in God, and thought it wrong to tell lies. She further stated that she was present at the time her mother was injured by the defendant. And thereupon the judge directed the witness to be sworn as a witness in the case. To

which decision of the court, allowing said witness to be sworn, the defendant, by his counsel, then and there excepted."

We find here nothing which by any rule of law or practice will permit us to interfere with the verdict. The ruling of the criminal court embodied no proper subject for appellate revision. The capacity or incapacity of the child as a witness, in certain essential particulars, was a question of fact which the judge determined upon personal inspection and oral examination. If any principle of law had been declared by him, as that, although found incapable of discriminating between truth and falsehood, the law made her, nevertheless, a competent witness, that might well be brought here for review. But I can find no case in which it is held proper for an appellate court to review the finding of fact. The contrary rule is declared by all respectable authorities. No hardship necessarily results; for if the judge should chance to err in his conclusion, the jury hold a powerful corrective in their right to pass upon the credibility of the witness, as tested on the stand by the usual appliances.

But aside from this view—with which, were not a human life involved, we might easily dismiss the subject—we cannot discover any reason to doubt the entire propriety of the court's permitting the witness to testify.

The history of criminal procedure in this and the mother country abounds in illustrations of a judicial care which seeks to secure, on the one hand, whatever pertinent testimony may bring a guaranty of conscious moral responsibility, and on the other, to admit none that may be offered without it. Distinctions and general rules have assumed various forms; but the spirit of all, as applied to children of tender years, appears in the simple formula of our own statute. The rule (Wagn. Stat., 1374, § 8) excludes merely "a child under ten years of age, who appears incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly."

We can discover no token of any such incapacity in the final answers given to the judge by the witness in this case. The course pursued on the occasion was eminently proper. There is a practice sanctioned by time-honored precedent, under which, when a child is found too young to testify with a proper sense of responsibility, the trial may be postponed until the witness shall have been suitably instructed. This, however, has been

criticised, as like "preparing or getting up a witness for a particular purpose." In the present case, even that objection disappears. While the child was so laboring under nervous agitation from the novelty of the surroundings as to give unintelligible or absurd answers, she was not permitted to testify. The court merely waited for a natural recovery of mental equilibrium, which should permit the true capabilities of the witness to appear. No sign was visible then in her examination that she was incapable either of receiving just impressions of the facts about which she was to testify, or of relating them truly. We can find no error in the record.

The judgment is affirmed; the other judges concur.

DANIEL vs. STATE.

(55 Ga., 222.)

EVIDENCE: *Memorandum.*

Where a witness refers in his testimony to a memorandum as showing a fact involved in the issue, and states that he has such memorandum in his pocket, it is error for the court to refuse to compel the witness to produce the memorandum.

WARNER, C. J. IT appears from the evidence in the record that the defendant claimed an interest in the bale of cotton alleged to have been stolen by him; that he took it publicly in the day time from the gin-house where it was ginned; that he raised the cotton; that the extent of his interest in it depended on the settlement of the accounts between him and Reid. The county court erred in not requiring the witness Reid, to produce the book of account against the defendant, which he admitted he then had in his pocket, inasmuch as he referred to that book of account in his testimony, as containing a statement of the defendant's indebtedness to him.

[The rest of the opinion is not considered of sufficient importance to be given.—
REP.]

NOTE.—So in *Duncan v. Seeley*, 34 Mich., 369, the court say: "On the trial, the plaintiff, being on the stand, was questioned by his counsel as to the time when he was at the place of the alleged sale after the sale was made; it being deemed important to show that he was there on a certain day. Plaintiff in reply

stated that he could not state positively without looking at something to refresh his memory. And after professing to look, he stated further that what he had looked at did refresh his memory. He was then called upon by defendant's counsel to produce the memorandum at which he had looked, but the counsel for the plaintiff objected, and the court sustained the objection. We think this was erroneous. The witness was in effect testifying, not from recollection, but from something which he professed to have in writing; and the other party had a right to know what the memorandum was on which he relied, and whether it had any legitimate tendency to bring the fact in controversy to mind. It would be a dangerous doctrine which would permit a witness to testify from secret memoranda in the way which was permitted here. The error was not cured in this case by the plaintiff offering on the next day, on the conclusion of his testimony, to produce the memorandum. The defendant was entitled to see it at the time, in order to test the candor and integrity of the witness; and the opportunity for such a test might be lost by a delay which an unscrupulous witness might improve by preparing or procuring something to exhibit."

BENNETT vs. STATE.

(52 Ala., 370.)

EVIDENCE: *Conclusion of fact — Irrelevant evidence — Warehouse.*

It is not competent for a witness who has testified "that he slept in the same room with the prisoner the same night that the crime he is charged with was committed, that the witness was wakeful; that he saw the prisoner go to bed, and found him in bed the next morning when he woke up," to testify further, that in his opinion the prisoner could not have gone out without his knowledge. This would be testifying to an inference of fact which it is the province of the jury to draw.

In a prosecution for larceny, it is not relevant to prove that third parties, who had an opportunity to commit the crime, were of bad character, such third parties not being witnesses, or charged with the crime, or otherwise connected with the case.

A building roofed over, of which one side and one end are planked up, the other side and end being left open so that wagons could drive under, used for storing cotton, and being enclosed, together with about two acres of land, by a tight plank fence, nine feet high, the gates of which are kept locked, is a warehouse.

APPEAL from Circuit Court of *Wilcox*. Tried before Hon. JOHN K. HENRY.

The appellants were convicted of larceny from a warehouse, under § 3707 of the Revised Code. On the trial one of them sought to establish an *alibi*. A witness for the defense testified that he was very wakeful; that he saw Bennett go to bed in the

same room in which witness slept that night, and found him next morning when he awoke; that there were two doors to the room; that these were the only openings, and that witness slept near one of them. The defense then "offered to show to the jury, that in the opinion of this witness, defendant could not have left, or got out of the house without witness knowing it." The court refused this offer, and "would not allow said evidence as to the witness' opinion to go to the jury, and defendants duly excepted." In the further progress of the trial, the defendants offered to show that the employees at the warehouse, from which the larceny was committed, but who were not witnesses, or in any way connected with the case, or charged with the theft, "were of bad character." The court refused to allow this proof to be made, and the defendants duly excepted.

The evidence showed that the building from which the cotton was stolen, was a covered structure, used for storing cotton bales. One side and end were planked up, and the other left open, so that wagons could drive under the shed thus formed, to load and unload. The structure, together with two acres of land connected therewith, was inclosed by a close plank fence nine feet high, the gates of which were kept locked. The court charged the jury, if they believed that such was the character of the place from which the cotton was stolen, and that it was used for storing cotton, it was a "warehouse" within the meaning of the statute. The defendants excepted to the giving of this charge. The various rulings to which exceptions were reserved are now assigned as error.

John McCaskill, for appellants: The witness' opinion, on facts already given the jury, should have been allowed for what it was worth. 29 Ala., 244; 19 Ohio, 302.

John W. A. Sanford, attorney general, with whom *J. Y. Kilpatrick*, *contra*: The court did not err in refusing to permit the witness to give his opinion. He was not an expert. 8 Watts, 406; 52 Mo., 221; *Whittier v. Town of New Hampshire*, Am. Law Reg., vol. 14, 704.

BRICKELL, C. J. It is peculiarly the province of the jury to draw deductions or inferences from facts, and it is seldom, if ever, permissible for a witness, not an expert, to give his mere opinion — an opinion which is a mere inference from facts — when the

jury are equally competent as to such matter to form the opinion or deduce the conclusion sought from the facts. The witness in this case was not an expert. The matter about which his opinion was sought was, as to an inference from facts, which it required no peculiar skill, or particular fitness or experience to solve. Whether the event could have happened, as to the occurrence of which the witness' opinion was desired, was a matter of which the jury, guided by their observation and experience, and the circumstances of the particular case, were the best and only judges. The question asked went to the merits of the whole case. There is no appreciable difference between the opinion asked for, and a request for the witness' opinion as to whether the *alibi* was proved. The question called for an opinion which was clearly inadmissible, and the court rightly refused to permit the witness to answer. *State v. Garvey*, 11 Minn., 163; *Don Crane and wife v. Town of Northfield*, 33 Vt., 124; *Com. v. Cooley*, 6 Gray, 355; *Pelunourges v. Clark*, 9 Ia., 16; *Walker v. Walker*, 34 Ala., 373.

II. The court did not err in refusing to allow the defendants to show the "bad character" of those in charge of the yard and press. It is expressly stated that they were not witnesses, or charged with the theft, or otherwise connected with the case. Such an issue was wholly foreign to that on trial. The proof offered would have needlessly incumbered the case, served to distract the attention of the jury from the main points involved, and have uselessly wasted the public time. It would be a dangerous precedent to allow a defendant to take up the time of the court in showing that parties living near the scene of the crime, or who had an opportunity to commit it, were of bad character; there often would be no end to the inquiries thus submitted to the jury, and the trial of criminal cases could thereby be protracted, sometimes beyond the term during which the court is authorized to sit. The evidence was inadmissible for another reason. It did not show whether the bad character was as to truth and veracity, or for honesty. If the proposed evidence was as to the character for truth and veracity, it would clearly be inadmissible, where the parties referred to were not witnesses or otherwise connected with the case, even if we could see that evidence of bad character for honesty was admissible.

III. There is nothing in the error assigned as to the charge of

the court. Under the evidence in this case the structure mentioned was a "warehouse" within the meaning of § 3707 of the Revised Code. *Hagan et al. v. State*, in MS. Besides this, the exception is a mere general exception to the entire charge of the court, not specifying the objectionable parts. In such cases, if any proposition in the charge is correct, the exception is not available.

The judgment of the court below is affirmed.

WRIGHT vs. STATE.

(50 Miss., 332.)

EVIDENCE: *Deposition before committing magistrates.*

Where the law requires a committing magistrate to take the voluntary confession of the accused in writing, the writing is the best evidence of what statement he made on his examination, and without proof of the loss or destruction of the writing, it is not competent to prove by parol what the accused said on such examination.

PERTON C. J. It appears that the plaintiff in error in this case was convicted in the circuit court of Hinds county, in the second district thereof, of the murder of one Charles Kelker, and sentenced to be hung, and hence the case comes to this court by writ of error.

Various errors are assigned here in the record of the proceedings and judgment in the court below. But in the view we take of this case, we deem it necessary to notice only the tenth assignment of error, which impeaches the correctness of the ruling of the court, in admitting oral evidence of what the defendant said in his voluntary statement before the justice of the peace, under the circumstances set forth in the record.

It is provided in section 2825 of the code of 1871, that in all criminal cases brought before any justice of the peace, he shall take the voluntary confession of the accused, and the substance of the material testimony of all the witnesses examined before him, in writing, and shall inform the accused of his right to interrogate such witnesses. Which questions, and the answers thereto, he shall also reduce to writing; the said proceedings and testimony, so taken and had, the said justice shall certify and

send up, together with the bonds and recognizances of the accused, and the prosecutor and witnesses, to the next term of the circuit court of the proper county, on or before the first day of the term.

On the trial in the court below, one Daniel Murchison, a witness on the part of the state, was permitted to testify as to what the accused had said in his voluntary statement before the committing magistrate, in opposition to objections from defendant's counsel. Said witness testified that he believed he remembered the substance of said statement, but that other matters might have been mentioned in that voluntary statement which witness did not remember, as he did not pay any very marked attention to the statement, although he was listening to the examination. The said voluntary statement was reduced to writing, and signed by the defendant, and produced in court by the prosecution.

As a general rule, applicable as well in civil as criminal proceedings, the law requires the production of the best evidence of which the case, in its nature, is susceptible. This rule does not demand the greatest amount of evidence which can possibly be given of any fact, but its design is to prevent the introduction of any which, from the nature of the case, supposes that better evidence is in the possession of the party. It is adopted for the prevention of fraud, for when it is apparent that better evidence is withheld, it is fair to presume that the party has some sinister motive for not producing it, and that if offered, his design would be frustrated. The rule thus becomes essential to the pure administration of justice. In requiring the production of the best evidence applicable to each particular fact, it is meant that no evidence of a nature merely substitutionary shall be received when the primary evidence is produceable.

As the statute requires that the justice of the peace shall reduce to writing the voluntary confession of the accused, and shall certify and send up the same to the next term of the circuit court of the proper county, on or before the first day of the term, the law *conclusively presumes* that if anything was taken down in writing, the justice of the peace performed his whole duty, by taking down all that was material. In such case, no parol evidence of what the prisoner may have said on that occasion can be received. But if it be shown that the examination was not reduced to writing, or if the written examination is wholly inadmissible,

by reason of irregularity, parol evidence is admissible to prove what he voluntarily disclosed. And if it remains uncertain whether it was reduced to writing by the magistrate or not, it will be presumed that he did his duty, and oral evidence will be rejected. 1 Greenl. Ev., 259, sec. 227.

Oral evidence cannot be substituted for any instrument in writing (which is not merely the memorandum of some other fact), the existence of which instrument is disputed, and its production material to the issue between the parties, or to the credit of the witnesses. One advantage derived from the application of this rule is, that the court acquires a knowledge of the whole contents of the instrument, which may have an effect very different from a statement of a part. "I have always," says Lord Tenterden, in the case of *Vincent v. Cole*, M. & M., 258, "acted most strictly on the rule that, whatever is in writing shall be proved by the writing itself. My experience has taught me the extreme danger of relying on the recollection of witnesses, however honest, as to the contents of written instruments. They may be so easily mistaken, that I think the purposes of justice require the strict enforcement of the rules."

This rule, however, does not apply where the instrument in question is shown to be destroyed or lost, or where the party who relies upon it is otherwise incapacitated from producing it.

In the case under consideration, the record shows that the voluntary statement of the accused was taken in writing, and that being the primary and best evidence of what that statement was, should have been produced, and the oral evidence of the witness as to what the prisoner stated on that examination, being secondary and inferior evidence, ought not to have been received on trial of the prisoner. *Peter v. State*, 4 S. & M., 31.

In the admission of this parol evidence on the trial of the case below, the court erred.

For this reason, the judgment will be reversed, the case remanded, and a new trial awarded.

MIDDLETON vs. STATE.

(52 Ga., 527.)

EVIDENCE: *Corroboration of accomplice.*

On a trial for felony, a conviction cannot be had on the testimony of an accomplice, unless such testimony is corroborated, and the corroboration must be as to some fact or circumstance tending to connect the respondent with the crime. It is not sufficient that the evidence of the accomplice is corroborated by facts which tend to show the commission of the crime, and that the accomplice was concerned in it.

CRIMINAL LAW. Before Judge SCHLEY, *Chatham* Superior Court, November Special Term, 1873.

Jack Middleton and William Seabrook were placed on trial for the murder of John Houston. The evidence disclosed the following facts: The body of deceased was found in the Savannah river, with the appearance of having been in the water several days. There was a wound upon the head which was sufficient to produce death. It looked as if made by a crow-bar, or some other such instrument. The deceased was employed as a watchman on a lighter which lay off Fort Jackson. This boat contained wrecking material. Some of this was subsequently found in Dennis O'Connell's junk shop, in the city of Savannah. It was purchased by O'Connell from Scott Thurman and Zeke Jackson. The former gave his name as Scott Williams.

Here the state introduced Scott H. *alias* Thomas H. Thurman, who had been indicted with the defendants for the same offense, a *nolle prosequi* having been first entered as to him. The witness testified as follows: On the 26th of September, 1872, Jack Middleton proposed that I ride with him in his boat; I consented. He, William Seabrook, Zeke Jackson and myself met at Mrs. McGuire's on Farm street; Middleton proposed that we all go on a riding expedition; we went, and found abreast Fort Jackson two large lighters or barges. We heard some one talking to Houston; we made fast to the pillars of the Fort; after a while I proposed a return; I went to sleep, and was awoke about half past eleven at night by a steamer; I wanted to come back, but Middleton took me over to the lighter; after getting up, Houston said he did not like so many men on board that time of night; Middleton asked him about selling the iron; Houston refused to sell—went into his cabin and got an old sword and

pistol; Middleton said, while Houston was gone, "shove him overboard and let him swim to shore;" I said, we had better tie him, if we do anything; it won't do to harm him. Middleton said, "you are fixing for him to halloo, now;" Seabrook said, "that aint worth a d—n." Jackson knocked Houston down as he was passing, with a crow-bar; witness tried to keep Jackson from throwing Houston overboard; Seabrook seemed also to be trying to stop it. Houston rose after being thrown in by Jackson, and swam to the boat; Jackson and Middleton loosened his hold and drowned him. Then Middleton and Jackson took the iron and passed it to Seabrook, who stored it away. Middleton cursed and abused me because I would not help; from fear I kept silent; we came up and landed at the canal dock; Middleton ordered all hands to meet there at five o'clock that morning; at eight I went down to the bluff, and saw them unloading a wagon; was present when the iron was sold; Mr. O'Connell paid Zeke Jackson \$18.10; Jackson then divided the money with the party; he kept \$6.00, Middleton took \$5.00, Seabrook \$3.50, and I was given \$3.60. Seabrook fastened the boat; Middleton said he wanted no cowards; that if he could not buy the iron, he'd have it anyhow. Went up the country to Effingham to work; after the arrest of Jackson and Middleton, I went to South Carolina; proposed to Seabrook to come to Savannah; he swore he would not. Mr. Morgan and Mr. Strobhar arrested me; told Mr. Morgan all about it when arrested, without any inducement offered. Seabrook broke and ran, but stopped and came back; he was with me at the time of the arrest. No bargain was between us, so far as I know, when we went down the river; did not know Houston; did not know what the party was about until they had remained at the Fort; went to sleep, and woke up at half past eleven at night; we left the city about five p. m.; don't know what they were talking about from the time they left the city; did not go to sleep until after we got to the Fort; when I wanted to go back, Jackson told me I was a child; it was after this that I went to sleep; I did not row back; up to the time that Jackson struck, nothing was said about killing, except what Middleton said about throwing him overboard. When Seabrook had hold of Houston, I asked him if he was pulling him away; he said, no, by G—d, he was choking him to keep him from hallooing; I made no effort to save Houston; saw it was no use;

we got back to the city about half past two in the morning; made a confession to the magistrate; nothing was offered me to confess.

Benjamin D. Morgan said: He had heard all that witness, Thurman, had said on the stand; it agreed with what he told him in South Carolina, almost word for word; Thurman's confession was voluntary; I told him if he would make the statements to me before a jury, he would be severely punished, but that his neck would be saved.

William Seabrook, in his statement, denied any connection with the murder; said it was Scott Thurman who tried to get him to come to Savannah from South Carolina, and swear against Middleton and Jackson.

Jack Middleton said he knew nothing about the matter, except what Thurman told him.

Thurman (recalled) said: Never had an opportunity of talking to Middleton; didn't say a reward was offered him with which to employ counsel.

The jury found the defendants guilty. A motion was made for a new trial, because the verdict was not authorized by the testimony. The motion was overruled, and defendants excepted.

J. V. Ryals, G. W. Owens and S. B. Adams, for plaintiffs in error.

Albert R. Lamar, Solicitor General, by *R. H. Clark*, for the state.

McCAY, J. There is in this record absolutely no evidence corroborating the accomplice, Thurman, in the sense of the law. We decided, in the case of *Childers v. State*, 52 Ga., 106, that the corroborating circumstances must be such as connect the prisoners in some way with the crime. We have, in that case, fully given our reasons for thus holding, and we will not repeat them. The conviction in the case at bar is based solely on the testimony of Thurman. There are circumstances going to show he is guilty, other than what he states, but absolutely none that the prisoners are. It is plain that he and Jackson sold the iron at the junk shop, and, identified as that iron was next day by the owner of it, he knew, before any confession was made, that there was evidence against him. It was small virtue for him to tell the tale he does after that. What circumstances there are in the

record, other than those detailed by the accomplice, rather go in favor of the prisoners. The junk man, as well as his employee, Monroe, both testify that neither of the prisoners was present when the iron was sold, and that Thurman and Jackson brought it to the shop. It is not at all a reasonable story that the head men in the murder and robbery should trust the plunder to the witness and to Jackson. The fair inference from his statement, too, is, that he meant to testify that all were present at the selling.

We only mention these circumstances to show that in common reason, it ought to take pretty strong circumstances to corroborate such an accomplice; whereas, in the sense of the law, there are no circumstances of corroboration — nothing that in any way connects the prisoners with the crime but the statements of the witness. That he told the same tale when arrested is not only no corroboration by any matter connecting the prisoners with the crime, but it is illegal testimony any way.

It is strange to bolster up a witness by proof that he has told the same story before. We know of no authority for such a practice.

Judgment reversed.

PEOPLE vs. AMANCUS.

(50 Cal., 293.)

EVIDENCE: *Impeachment of witness.*

When the character of a witness has been attacked by evidence that he has been convicted of felony, it may be sustained by evidence of his general reputation for truth and integrity.

WALLACE, C. J. Sachell, a witness for the prosecution, having testified in chief, was asked by the counsel for the defendant whether he had been convicted of felony, and answered that he had. Subsequently, the prosecution called a witness to prove that the general reputation of Sachell for truth, honesty and integrity in the community in which he resided was good. This proof was objected to by the counsel for the prisoner, on the grounds "that the same was irrelevant, incompetent and inadmissible; that no evidence had been offered by the prisoner

tending to impeach the said witness, Sachell, for truth, honesty and integrity."

The objection was overruled, and the proof admitted. An exception reserved by the prisoner to the ruling in this respect presents the only question to be considered upon this appeal.

The Code of Civil Procedure (sec. 2051) is as follows: "A witness may be impeached by the party against whom he is called, by contradictory evidence, or by evidence that his general reputation for truth, honesty or integrity is bad, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he has been convicted of a felony." It is apparent that when the prisoners proved that Sachell had been convicted of felony, it amounted to an impeachment or an attempted impeachment of the witness, under the provision of the code just referred to. It was a direct assault upon his reputation for truth, honesty and integrity, made in the manner pointed out by the code concerning the impeachment of witnesses. The prosecution, therefore, has the right to sustain its witness by evidence of his good character, under the provisions of section 2053 of the same code, which provides in substance that the testimony of a witness may be supported by evidence of his good character, where such character has been impeached. The argument for the prisoner made here, asserts that "the proof of the previous conviction of the witness is in no sense an attack upon his general character for truth, honesty and integrity. The conviction is simply the consequence of one act of misconduct, and one particular act is not sufficient to make a general character. The law recognizes this, when it does not allow particular acts of misconduct on the part of witnesses to be shown by way of impeachment." (Code of Civ. Proc., sec. 2051.) If the proof of his previous conviction of a felony did not amount to an attack upon the general character of the witness for truth, honesty and integrity, what, it may be inquired, was the purpose of its introduction? Certainly it was not to exclude the witness on the ground of incompetency to testify by reason of infamy; for, under any rule, it came too late for that purpose, and not in the proper form.

But had it been offered at the earliest opportunity, and by the production of the record of conviction, it would not have availed

to exclude the witness, because section 1879 of the same code provides, that a previous conviction of felony shall not operate to disqualify a witness, or preclude him from testifying in the case. It is apparent that the purpose of the proof that the witness had been convicted of a felony was (under section 1879) to repel the presumption that he spoke the truth, "by evidence affecting his character for truth, honesty and integrity," which in itself amounts to impeachment, for there is no force in the reference made to the general rule which forbids the impeachment of a witness by evidence of particular wrongful acts, because the Code of Civil Procedure (sec. 2051) already cited, while referring to the general rule, expressly permits proof of a conviction of felony as an exception to that rule.

Judgment affirmed.

KEAN vs. COMMONWEALTH.

(10 Bush, Ky., 190.)

EVIDENCE: *Evidence of deceased witness on former trial — Reputation of family of witness.*

The evidence of a deceased witness, given on the first trial of the respondent, is admissible against him on a second trial of the same indictment.

But the statement in a bill of exceptions of the testimony of a deceased witness, given on a former trial, is not admissible against the respondent on a second trial of the same indictment. The testimony of the deceased witness must be proved by persons who were present at the first trial. The respondent has a right to be confronted with the witnesses against him.

In impeaching the character of a witness, evidence of the bad repute of his family or associates is irrelevant and inadmissible.

PRYOR, J. The appellant, *Henry Kean*, was indicted in the Jefferson circuit court, charged with murdering one Avery. He has been twice tried and found guilty as charged, and the case is in this court the second time for revision. A witness by the name of Maddox, who testified in the first trial, died before the second trial took place. His evidence was embodied in a bill of exceptions prepared in the court below, and considered in this court on the first appeal. On the second trial of the case, the one now being considered, the statements purporting to have been made by Maddox, as contained in the bill of evidence, were

permitted, against the objections of the accused, to be read as evidence to the jury. It is now urged by appellant's counsel that the admission of this testimony was in violation of the twelfth section of the bill of rights, which provides that in all criminal prosecutions, the accused hath the right to meet the witnesses face to face.

The conviction of the accused, in both instances, was upon circumstantial testimony alone, and the learned judge selected to try the case in the court below, in overruling the motion for a new trial, delivered an able though not convincing argument in favor of the competency of the testimony admitted.

Many authorities are referred to in behalf of the state, sustaining the right of the commonwealth to prove, by other witnesses, the statements of a deceased witness made under oath, in the same case and upon the same issue between the same parties. In this case, Maddox had been once examined as a witness, and the whole current of authority is, that in such a case those who were present and heard the statements of the deceased witness may testify as to what these statements were, if the witnesses so called are able to give the substance of all that was said by the dead witness, when the latter testified. The requirement that the accused shall have the right to meet the witnesses face to face is thus complied with, and no constitutional right violated.

The question in this case is not whether the statements of a deceased witness on a former trial were competent, for this must be conceded, but has the accused been deprived of a constitutional right in permitting a written statement of what the deceased witness said to go to the jury? We think he has, and that a witness or witnesses should have been called to prove these statements without reference to what was contained in the bill of exceptions. The evidence in a bill of exceptions may be read (when the witness is dead) in a civil action where a retrial has been ordered, but we have found no case where such testimony has been allowed in a criminal prosecution. The testimony of what a deceased witness stated is competent in either a civil action or criminal prosecution, but the mode of proving it is different. In a civil case, either mode may be adopted, but in a criminal prosecution, the statements must be proved by living witnesses who speak from their own recollection of what the deceased witness said. These witnesses are before the accused and

the jury. The accused has the right to cross-examine, and to know, or ascertain from the witness, that he is detailing in substance all that was spoken by the deceased witness; without this, he is deprived of any oral examination, or of even knowing who is to testify against him. It is the presence of the witness that this provision of the bill of rights entitles the accused to have. The competency of the testimony when offered is with the court, but the right of the accused to see or confront the witness is an indispensable requirement.

In this case, the evidence of the deceased witness was reduced to writing by one of the counsel for the accused, from the notes of the testimony taken by the judge presiding at the first trial. It is shown by this attorney that these notes were inaccurate. The judge is not called on to testify, or the right to cross-examine allowed, in order that the accused may know how much of the testimony was omitted, or whether the attorney had embodied in the bill of evidence the substance of all the witness stated.

In this case, others seem to have been charged with the commission of the crime in connection with the accused. His associations with these parties as to time, place, etc., as well as many other circumstances, are necessary to be shown by the commonwealth in order to make an unbroken chain of testimony against the accused. A fact or circumstance proven on the first trial, and then regarded as immaterial by the court and counsel, might become of vast importance to the accused on the second trial, and therefore the necessity of having the witness before the jury in order that the accused may cross-examine.

Section 365 of the code provides "that in making an exception, only so much of the evidence shall be given as is necessary to explain it, and no more." This court has no power to reverse a judgment of conviction in a criminal case for the reason that the evidence does not authorize it. If there is any proof conducing to show the prisoner's guilt, the judgment must be sustained in this court, unless there has been some error of law to the prejudice of the accused, committed during the progress of the trial, and for which this court, by the provisions of the code, has the power to reverse. The court below, therefore, in making out a bill of evidence in a criminal case, only gives so much of it as will enable this court to determine the questions of law arising on the facts, and would necessarily omit many circumstances or

facts that were or might be of importance to the accused before a jury, and of but little consequence in this court.

The evidence in the case was taken down on the last trial, and adds nearly one thousand pages to the record, and it might well happen that the substance of all that was said by this witness was not contained in the bill of evidence. It is a constant occurrence for counsel to disagree as to what a witness has sworn to, both recollecting with equal clearness, and the court determining the issue between them, more with the view of having the legal questions arising, presented properly to this court than to get the substance of all the witness said. Even those who are present and favorably inclined to one party are very apt to make the language used by the witness conform to their own wishes, and hence the absolute necessity of giving to the accused, where his life or liberty is involved in the issue, the right of cross-examination. This right of the accused to confront the witness testifying against him is declared in both the federal and state constitutions, and doubtless in the constitution of every state in the union; a right indispensable to the citizen when his life or liberty is involved, and the admission of this silent witness is, in our opinion, in plain violation of the twelfth section of the bill of rights. (5 Ohio, 354; 10 Humph., 486; *Walston v. The Commonwealth*, 16 B. Mon., 15.)

It is maintained by counsel for the state that the evidence, conceding it to be incompetent, did not prejudice the rights of the accused. The persistency of counsel for the state in the court below in having it before the jury, as well as the importance attached to the question by the judge presiding at the trial, is sufficient evidence of its importance, without analyzing the testimony to show it. It is also insisted that, as the admission of incompetent testimony was not made a ground for a new trial in the court below, this court has no jurisdiction over the question. This question has heretofore been decided in the case of *Johnson v. The Commonwealth*, 9 Bush, 224.

The instructions given contain, in substance, the law of the case. Instruction No. 4 is rather an argument upon the effect of a confession than an instruction to the jury; as an abstract proposition of law it cannot be questioned, but in its application to the facts of a case, we doubt whether a jury should be told that a confession voluntarily made was among the most effectual proofs

in the case. The confession had been permitted to go to the jury, and they should have been left to consider it in connection with the other testimony in the case. The caution given juries in receiving proof of verbal confession has always been held proper, by reason of the humane and merciful considerations to which the accused is always entitled when on trial upon an issue involving his liberty or life.

No reversal would have been had, however, by reason of this instruction, as we are well satisfied the substantial rights of the accused were not affected by it. The other objections made to the rulings of the court are not available, even if such rulings were erroneous, as they are questions over which this court has no revisory power.

It is proper to suggest that in impeaching the character of a witness, by showing that he is not entitled to credit on oath, proof that his family or associates are in bad repute is clearly incompetent. It is the general character of the witness assailed that is in issue, and not that of his family.

We have examined this large record carefully, and refrain from expressing, as we have no right to do so, an opinion as to the guilt or innocence of Henry Kean; but whatever his condition in life may be, or the circumstances surrounding him, he is entitled to a fair and impartial trial and the maintenance of his constitutional rights.

The judgment of the court below is reversed, and cause remanded, with directions to award to the appellant a new trial, and for further proceedings consistent with this opinion.

NOTE.—The testimony of a deceased witness, examined on a former trial on a criminal charge, may be proved on a second trial for the same offense. *Pope v. State*, 22 Ark., 372. The prosecution, on a second trial for a crime, may prove what a witness, since deceased, testified to on a former trial. The general rules of evidence are the same in both criminal and civil cases. The testimony of a witness, since deceased, given on a former trial in a criminal case, may be proved on a subsequent trial, by permitting a person who kept notes of such testimony, and who swears they contain the substance of the testimony, to read his notes to the jury. *People v. Murphy*, 45 Cal., 187.

What a deceased witness testified on a former trial in a criminal case may be proved by a witness who was present and heard the deceased witness testify. The witness giving evidence of what the deceased witness testified to on a former trial must, however, give his evidence from his own recollection. If the witness who heard the deceased witness testify on a former trial be the attorney of the accused in both trials, the state, nevertheless, has the right to have his testimony on this

point, his recollection of all the important facts testified to by the deceased witness in favor of his client being presumed. *State v. Cook*, 23 La. An., 347.

Testimony proving the statements made by a deceased witness on oath, at a former trial, between the same parties, being one of the *established exceptions* to the rule that *hearsay is incompetent* as evidence, the admission of a witness to give evidence of this kind, in a criminal case, does not contravene the constitution.

It is not essential to the competency of such evidence, that it be given in the exact words used by the deceased person; but while the witness is allowed to give the *substance* of the statements of the deceased person in the former trial, he is not allowed the latitude of giving their mere *effect*.

It is essential to the *competency of the witness* called to give this kind of evidence, first, that he heard the deceased person testify on a former trial; and, second, that he has such accurate recollection of the matter stated, that he will, on his oath, *assume* or *undertake* to narrate, in substance, the matter sworn to by the deceased person, in all its material parts, or that part thereof which he may be called on to prove.

It is essential to the *competency of the evidence*, first, that the matter stated at the former trial by the witness, since deceased, should have been given on oath; second, between the same parties, and touching the same subject matter; where opportunity for cross-examination was given the person against whom it is now offered; and, third, *that the matter sworn to by the person since deceased be stated in all its material parts, and in the order in which it was given, so far as necessary to a correct understanding of it.* *Summons v. State*, 5 Ohio St., 325.

On the second trial of the accused upon an indictment for assault with intent to murder one H., the state was permitted to show that H. had died since the previous trial, and then to prove by a witness the testimony given by H. as a state's witness upon the previous trial. *Held*, that although there are many authorities against the competency of such evidence in criminal cases, yet the great preponderance of judicial decisions, in both England and America, now concurs with the better reasoning in holding that such evidence is competent and admissible as well in criminal as in civil cases. *And held further*, that it is not necessary to prove the precise language used by the deceased witness in his testimony; the substance of his entire testimony is sufficient, and may be stated in different language than that employed by him. *Greenwood v. State*, 35 Tex., 587.

Proof of what a deceased witness testified to on a preliminary examination before a justice of the peace, touching the same charge for which the accused stands indicted, is admissible against him, although the examination was not reduced to writing. In such a case, it is not necessary to prove the language used by the witness in giving his testimony; its substance is all that is required. But proof of what a deceased witness testified to on a former trial is not admissible, unless the point in issue is the same. *Davis v. State*, 17 Ala., 354. The rule in regard to the proof of the testimony given in a former trial, by a witness who has since died, is the same in civil and criminal cases. So, upon the trial of a party on a charge of manslaughter, it was held competent for the prosecution to prove by persons who heard and remembered it, the testimony of a witness in the preliminary examination before a justice of the peace, such witness having died before the final trial. *Barnett v. People*, 54 Ill., 325.

A person was arrested and taken before the proper officer, charged with robbing the mail. At the preliminary examination, a witness, since deceased,

testified in relation to the offense. The accused was present, and his counsel cross-examined the witness. Witnesses were permitted to prove, on a trial before a jury, under an indictment found for the same offense, what the deceased witness testified at the preliminary examination. The rules of evidence in civil and criminal cases, in this particular, are the same. It is sufficient, in such case, to prove substantially all that the deceased witness testified upon the particular subject of inquiry. *United States v. Macomb*, 5 McLean, C. C. (U. S.), 236.

A deposition of a witness, taken before the preliminary examination before a committing magistrate in the presence of the accused, may be received in evidence on the trial upon proof of the death of such witness (RYLAND, J., dissenting). The provision of the constitution of this state declaring "that in all criminal prosecutions the accused has the right to meet the witnesses against him face to face" does not render such evidence illegal. (RYLAND, J., dissenting.) *State v. McO'Brien*, 24 Mo., 402.

Rushing, who was examined as a witness against Kendrick, before a committing court, died before the trial of Kendrick in the circuit court. The attorney for the state proposed to prove on the trial what Rushing had stated before the committing court. This evidence was held not in violation of the constitutional right of the defendant to meet witnesses against him, face to face, for Kendrick had met Rushing face to face before the committing court, and had the right to cross-examine him, and had in the circuit court the right to cross-examine those who proved what Rushing had stated. Where it is proposed to introduce the testimony of a deceased witness given on a former trial between the same parties, it is not necessary to prove the exact words of such deceased witness. It is sufficient if the substance of all he said on the examination and cross-examination in relation to the subject matter in controversy be proved. *Kendrick v. State*, 10 Humph., 479.

On the examination before a justice of the peace of a prisoner charged with murder, the testimony of a witness for the commonwealth was taken in writing. The witness having died, the notes of his testimony were admissible on the trial. *Brown v. Commonwealth*, 73 Penn. St., 321.

The 12th article of the Declaration of Rights, which provides, that in criminal cases, the accused shall have the right "to meet the witnesses against him, face to face," is not violated by the admission of testimony in a criminal trial before a jury, to prove what a deceased witness testified at the preliminary examination of the accused before a justice of the peace.

It is not sufficient, in such case, to prove the substance and effect merely of the testimony of the deceased witness, although the memory of the witness offered to prove such testimony, be aided by notes taken at the preliminary examination; but the whole of the testimony of the deceased witness upon the point in question, and the precise words used by him, must be proved. *Commonwealth v. Richards*, 18 Pick., 434. If a hearing be had before a magistrate, upon the complaint of a town grand juror charging a person with the commission of a crime, and the respondent be, by the magistrate, bound over for trial by the county court, and an indictment be found against him, and before a trial is had upon the indictment, a witness, who testified before the magistrate, dies, evidence may be received on trial upon the indictment, to prove what that witness testified before the magistrate. And it is not necessary, on such trial, to prove the exact language used by the witness in giving his testimony before the magistrate; it is sufficient, if the

substance of his testimony, as there given, be detailed. *State v. Hooker*, 17 Vt., 658. But the rule seems to be otherwise in Tennessee and Virginia, where it is held that the evidence of a deceased witness cannot be given by the prosecution in a criminal case. See *State v. Atkins*, 1 Overt. (Tenn.), 229, and *Finn v. Com.*, 5 Rand. (Va.), 701.

SHIVERS VS. STATE.

(53 Ga., 149.)

EVIDENCE: *Practice—Continuance.*

Under a statute which provides that the certificate of any public officer of the state to any record, document, paper on file, or other matter or thing in his office, shall be admissible in evidence in any court of the state: *Held*, that such certificate is admissible against a defendant in a criminal case, and that his constitutional right to be confronted with the witnesses against him is not thereby violated.

The defendant applied for a continuance when the case was called for trial, on the ground that the indictment was only found two days previously, and his counsel had been so much engaged that he had not been able to prepare the case for trial. It being made to appear by the certificate of the trial judge, that the defendant had been arrested the term before, and was then fully informed of the charge against him, and was asked if he desired counsel, and wanted a trial, to both of which questions he answered no: *Held*, there was no error in overruling the motion for a continuance.

SHIVERS was indicted for the offense of embezzling \$11,000, collected by him as tax collector for the county of Hancock, during the year 1871. He pleaded not guilty.

When the case was called for trial, he moved for a continuance on the ground that the indictment had been found only two days previous thereto, and his counsel had been constantly engaged in the business of the court to the exclusion of any opportunity of making preparation in the case, or even of consulting with his client. The motion was overruled and defendant excepted.

It was shown by the prosecution that the defendant was the tax collector of Hancock county; that the state tax assessed for the year 1871, on the taxable property of said county, was \$11,000; that the defendant had collected various amounts from divers tax payers during that year; that when the solicitor general, as agent for the comptroller general and treasurer of the state, demanded the \$11,000 from him, he replied that he had collected and used the money, and did not then have a dollar, but that "if they would give him a chance, he would make it and pay it."

The solicitor general tendered in evidence the following papers:

“HANCOCK COUNTY—S. C. SHIVERS, *Tax Collector*.

“To general and poll tax, 1871.....	\$12,076 77
“1873. January 8th, by general tax paid treasurer.....	284 05
“1873. January 8th, by poll tax paid treasurer	513 00

“OFFICE OF THE COMPTROLLER GENERAL

“OF THE STATE OF GEORGIA.

“ATLANTA, GA., *January 24, 1874.*

“I, W. L. Goldsmith, comptroller general of the state of Georgia, do hereby certify that the above and foregoing account of S. C. Shivers, tax collector of the county of Hancock, in said state, for the year 1871, is a full, true and complete exemplification taken from the books on file in this office, and there required to be kept by law, in which the accounts with said state, of all the tax collectors thereof, are kept according to law; that said account is truly and correctly taken and copied from said books; that the same is a full, true and complete exemplification of all the accounts of said S. C. Shivers with said state, as such tax collector, from the year 1871 up to the present date, as copied and taken from said books; that the balance of \$11,-279.72 due thereon is unpaid, and that the amounts credited thereon January 8th, 1873, were paid by L. L. Lamar, tax collector of said county.

“Given under my hand, official signature and seal of office, 24th day of January, 1874.

(Signed) “W. L. GOLDSMITH, *Comptroller General.*”

Also certificate from the treasurer, in similar form to transcript from his books, covering all payments into the treasury during the month of December, 1871, from whatever source, among which none appeared as having been made by the defendant.

This evidence was objected to, but was admitted by the court, and defendant excepted.

The jury found the defendant guilty. A motion was made for a new trial upon each of the above grounds of exception. The motion was overruled, and defendant excepted.

As to the refusal of the continuance, the presiding judge certified as follows:

“When this case was called, it was postponed for a day to give defendant’s counsel time. The defendant was arrested the

term before and brought before me under a warrant. When asked by the court if he wanted counsel, he said 'no.' If he wanted a trial, he said 'no.' He was fully informed then of the nature of the accusation, as much as he was after the bill was found."

George F. Pierce, M. W. Lewis and F. L. Little, for plaintiff in error.

Samuel Lumpkin, Solicitor General, for the state.

WARNER, C. J. The defendant was indicted for the offense of embezzlement, and on the trial thereof was found guilty by the jury. A motion was made for a new trial, on the several grounds alleged therein, which was overruled by the court, and the defendant excepted. Two grounds of error only have been insisted on here: First, the refusal of the court to grant the defendant a continuance on the showing made therefor; and second, in admitting in evidence the certified copies of the record books of the state treasurer and comptroller general, the defendant insisting that he was entitled to be confronted with the witnesses testifying against him, and that, in allowing the certified copies of the records kept by those officers to be read in evidence, the defendant was deprived of a constitutional right. By the law of this state, the certificate of any public officer thereof, of any record, document, paper on file, or other matter or thing in their respective offices, or appertaining thereto, is admissible in evidence in any court of this state. Code, sec. 3816.

The mistake of the plaintiff in error in this case consists in the assumption that the certificates of the treasurer and comptroller general as to what appears in the records of their respective offices is the personal testimony of those officers; whereas, they only certify what appears on the records of their office. They were not personally examined as witnesses against the defendant. If they had been offered as witnesses against the defendant at the trial, they would necessarily have been required to testify in open court; their testimony could not have been taken by interrogatories. From the explanatory note of the presiding judge, and in view of the facts contained in the showing for a continuance, the defendant had reasonable time and opportunity to have prepared his defense.

As a general rule, the court before which the case is tried will

be allowed a liberal discretion as to the continuance of cases, and this court will not interfere with it, unless it has been manifestly abused, and injustice done.

Let the judgment of the court below be affirmed.

STATE vs. STANLEY.

(64 Me., 157.)

FALSE PRETENSES.

On an indictment for false pretenses, in the sale of a horse, a pretense that the horse was sound, when the respondent knew that he was not, is a false pretense within the statute.

APPLETON, C. J. This is an indictment for cheating one Sullivan by means of certain false pretenses.

The allegations in the indictment are, that the defendant, in an exchange of horses with one Sullivan, knowingly, designedly and falsely pretended that his (the respondent's) horse was a sound horse, when, in fact, it was not; that said Sullivan believed said false pretense, and was thereby deceived, and induced to exchange and deliver his horse to the respondent, and was thus defrauded.

The question is, whether or not the indictment sets forth a false pretense within Rev. Stat., ch. 126, § 1.

The assertion of the soundness of his horse by the defendant is the assertion of a material fact. It is false. It was made to deceive and defraud. It accomplished its purpose. This much the demurrer admits. It is not readily perceived why this falsehood is not within the spirit, as well as the letter, of the statute.

In *State v. Mills*, 17, Me., 211, the owner of a horse represented to another that his horse, which he offered in exchange for the property of the other, was a horse known as "the Charley," when he knew that it was not the horse called by that name, and by such representation obtained the property of the other person in exchange, it was held that the indictment was sustained, although the horse said to be "the Charley" was equal in value to the property received in exchange, and as good as "the Charley." So the statement that the property is unin-

cumbered, when the fact is otherwise, will sustain an indictment for cheating by false pretenses, notwithstanding there may have been a warranty, if the false pretense, and not the warranty, was the inducement which operated upon the party to make the exchange. *State v. Dorr*, 33 Me., 498. In *The People v. Crissie*, 4 Denio, 525, an indictment that the defendants falsely pretended to a third person that a drove of sheep, which they offered to sell him, were free of disease and foot-ail, and that a certain lameness, apparent in some of them, was owing to an accidental injury, by means of which they obtained a certain sum of money on the sale of said sheep to such person, with proper qualifying words, and an averment negating the facts represented, was held good under the statute against cheating by false pretenses. In *Reg. v. Jackson*, 3 Camp., 370, it was held to be an offense to obtain goods by giving a check on a banker with whom the drawer kept no cash. So the representation that a bank check was a good and genuine check, and would be paid on presentation, when the drawer had no funds in the bank on which it is drawn, is a false pretense. *Smith v. People*, 47 N. Y., 303. So false representations as to quality may constitute a false pretense, for which the person so falsely representing may be indicted. *Reg. v. Sherwood*, 40 Eng. Com. Law, 585. So by giving false samples. *Reg. v. Abbott*, Den. C. C., 379. In *Reg. v. Kenrick*, 48 Eng. Com. Law, 49, the false pretense was that the horses were the property of a private person, and not of a horse dealer and that they were quiet and tractable, and Lord DENMAN, C. J., says; "The pretenses were false, and the money was obtained by their means," and the indictment was sustained. In that case the purchaser wanted a quiet and tractable horse; in the one at bar a sound one was wanted. In that case, as in the one at bar, the false representation was effective to defraud.

A false pretense may relate to quality, quantity, nature or other incident of the article offered for sale, whereby the purchaser, relying on such false representation, is defrauded. *Reg. v. Abbott*, 61 Eng. Com. Law, 629. A mere false affirmation or expression of an opinion will not render one liable. It must be the false assertion of a material fact, with knowledge of its falsity. *Bishop v. Small*, 63 Me., 12; *Reg. v. Reed*, 32 Eng. Com. Law, 904. No harm can happen to any one from abstinence in the making of false representations. When made, and material

and effective for deception, no sufficient reason is perceived why the guilty party should escape punishment.

Exceptions overruled.

Indictment adjudged good.

DICKERSON, DANFORTH, VIRGIN, PETERS and LIBBEY, JJ., concurred.

KELLER vs. STATE.

(51 Ind., 111.)

FALSE PRETENSES: *Indictment—Criminal pleading—Contradictory allegations.*

An indictment for false pretenses in selling a mortgage which alleges that the prisoner pretended that he had recently sold the real estate covered by the mortgage, and that said real estate was situated in I., but which does not give the name of the purchaser or describe the property, without alleging that such name and description are unknown, is bad on a motion to quash as being too uncertain and indefinite.

In an indictment for false pretenses in the sale of a \$500 mortgage, where the pretense was that the real estate covered by the mortgage was worth \$3,500, an allegation that the real estate was not worth \$3,500 is insufficient. The indictment should show that the property was not of sufficient value amply to secure the sum of \$500.

It *seems* that, in a prosecution for false pretenses in the sale of a mortgage, if the real estate covered by the mortgage is sufficiently valuable amply to secure the sum due on the mortgage, it is immaterial that the respondent represented the real estate to be very much more valuable than it actually was.

In an indictment for false pretenses in the sale of a mortgage, where the pretense is that the property covered by the mortgage is not subject to any prior liens, an allegation that the property was subject to prior liens, but which does not set them out or describe them, is insufficient.

The averments in criminal pleadings should be definite, clear and distinct.

Representations of future events are not false pretenses, which must be as to existing facts.

An indictment containing contradictory and repugnant allegations is bad.

BUSKIRK, J. The appellant was indicted in the court below for obtaining property by false pretenses. The indictment contains two counts, which, as to the false pretenses charged, are nearly identical. The appellant moved to quash each count, but this motion was overruled, and he excepted. He pleaded not guilty, and was tried by a jury and was found guilty. The court

overruled the motions in arrest of judgment and for a new trial, to which exceptions were taken. Judgment was rendered on the verdict.

The appellant has assigned for error, the overruling of his motions to quash the indictment, in arrest of judgment, and for a new trial.

The first question for the consideration of the court relates to the sufficiency of the indictment.

The first count, omitting the formal parts, is as follows: "The grand jurors of Tipton county, in the state of Indiana, good and lawful men, duly and legally impaneled, sworn and charged in the Tipton circuit court of said state, at the spring term for the year 1875, to inquire into felonies and certain misdemeanors in and for the body of the said county of Tipton, in the name and by the authority of the state of Indiana, on their oath do present that one Robert H. Keller, late of said county, on the 13th day of October, in the year 1874, at and in the county of Tipton, and state of Indiana, did then and there unlawfully, feloniously, designedly and with intent to defraud one George W. Boyer, falsely pretend to the said George W. Boyer, that he, the said Robert H. Keller, had been the owner, and had recently sold to a certain party a certain piece of real estate, to wit, a house and lot of ground, situated in the city of Indianapolis, in the county of Marion, in the state of Indiana, for a large sum, to wit, the sum of thirty-five hundred dollars; that said real estate was of great value, and fully worth the said sum of thirty-five hundred dollars, and that there was still due the said Robert H. Keller, upon the purchase money of said house and lot of ground so sold as aforesaid, the sum of five hundred dollars, and that there was no lien or incumbrance on said house or lot of ground except the said lien of five hundred dollars, for the purchase money thereof, due the said Robert H. Keller, as aforesaid, and that if the said George W. Boyer would sell and deliver to the said Robert H. Keller, goods, chattels and property to the amount of five hundred dollars, he, the said Robert H. Keller, would pay the said George W. Boyer therefor, in and with a promissory note given and being for the said sum of five hundred dollars, the purchase money due the said Robert H. Keller, upon the said house and lot of ground as aforesaid, and to be made payable to the said George W. Boyer, on the 1st day of March, in the year 1875, and secured

by a mortgage upon the said house and lot of ground, and that the said lien of five hundred dollars, for the purchase money for the said house and lot of ground, and the said mortgage securing the same, was all and the only lien whatever upon the said house and lot of ground, and that the said house and lot of ground were of the full value of thirty-five hundred dollars, and ample and sufficient surety for the payment of the said purchase money as aforesaid, and that the note executed as aforesaid to the said George W. Boyer would be of the full value of and worth the sum of five hundred dollars.

By means of which said false pretenses then and there made to the said George W. Boyer, by the said Robert H. Keller, as aforesaid, he, the said Robert H. Keller, did then and there, with intent to cheat and defraud him, the said George W. Boyer, unlawfully and feloniously obtain and receive from the said George W. Boyer, the following goods, chattels and property, to wit: one spring wagon, of the value of two hundred and twenty-five dollars; one two horse wagon, of the value of one hundred and fifty dollars; one log wagon of the value of one hundred and twenty-five dollars; all of the said goods, chattels and property, being of the aggregate value of five hundred dollars; and for the goods, chattels and property of the said George W. Boyer, and in payment for the said goods, chattels and property so obtained and received by the said Robert H. Keller, from the said George W. Boyer, as aforesaid, he, the said George W. Boyer, did receive the said five hundred dollar note, fully relying upon and believing said false and fraudulent pretense and representations made to him by the said Robert H. Keller, as aforesaid, and believing them to be true; whereas, in truth and in fact, the said Robert H. Keller had not then recently sold to a certain party a certain piece of real estate, to wit: a house and lot of ground situate in the city of Indianapolis, in the county of Marion, in the state of Indiana, for a large sum, to wit: for the sum of thirty-five hundred dollars, as aforesaid; and that said house and lot of ground were not then of the value or worth thirty-five hundred dollars as aforesaid; and that the said lien and mortgage of five hundred dollars on the said house and lot of ground for the purchase money thereof as aforesaid, was not the only lien and incumbrance then upon said house and lot of ground, but there were various and numerous other liens

thereon, older and prior to the said lien of five hundred dollars, amounting in the aggregate to two thousand dollars, and greatly exceeding the value of said house and lot of ground; and that said house and lot of ground were not then of sufficient value to amply and sufficiently secure the payment of the said five hundred dollar note, as aforesaid; and that said note, executed to the said George W. Boyer, as aforesaid, was not worth or of the value of five hundred dollars, but was in fact entirely worthless, and of no value whatever, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Indiana."

We proceed to the examination of the first error assigned. The first count in the indictment has been set out, and as it is quite lengthy, we will summarize its averments and negations.

1. It is averred that Robert H. Keller (falsely pretended that he) had been the owner, and had recently sold to a certain party, whose name is not given, nor is it averred that this name was unknown to the jurors, a certain piece of real estate, to wit: a house and lot of ground situate in the city of Indianapolis, county of Marion, and state of Indiana, for a large sum of money, to wit: for the sum of thirty five hundred dollars. There is no further description of such real estate or any averment that it was unknown to the jurors.

2. That said real estate was of the value of thirty-five hundred dollars.

3. That there was still due the said Robert H. Keller, upon the purchase money of said house and lot the sum of five hundred dollars.

4. That there were no liens or incumbrances upon the said house and lot except said sum of five hundred dollars for the unpaid purchase money, and the mortgage securing the same.

5. That the said house and lot of ground were of the full value of thirty-five hundred dollars, and ample and sufficient security for the said sum of five hundred dollars.

6. That the note which was executed by the purchaser of said real estate to George W. Boyer, to whom said representations were made, and in reliance upon which he had sold to said Keller certain personal property, would be of full value, and worth the said sum of five hundred dollars.

The first averment is very vague and indefinite. There is no

sufficient description of the real estate alleged to have been owned and sold by the appellant. Nor is the name of the purchaser given. Criminal charges must be preferred with reasonable certainty, so that the court and jury may know what they are to try, of what they are to acquit or convict the defendant, and so that the defendant may know what he is to answer, and that the record may show, as far as may be, of what he has been put in jeopardy. The averments should be so clear and distinct that there could be no difficulty in determining what evidence was admissible under them. It fully appears from the evidence in the record that the appellant had owned and transferred lot No. 46, in Yandes' subdivision of outlot No. 129, in the city of Indianapolis, county of Marion, and state of Indiana. This evidence was admitted over the objection and exception of appellant. Its admission was objected to on the ground that the averments of the indictment were neither specific nor broad enough to render such evidence admissible. If the appellant, in his representations to Boyer, did not describe the property which he had owned and sold, the description of the property could not have been introduced in that portion of the indictment; but the first averment as above set out might have been preceded or followed by a statement that the appellant had owned and recently sold lot 46 in Yandes' subdivision of outlot No. 129, in the city, county and state aforesaid, and that the representations relied upon were made in reference to such property. If the name of the purchaser of such lot was known to the grand jury, it should have been stated, but if unknown, that fact should have been averred.

The negation to the first averment is as follows:

"Whereas, in truth and in fact, the said Robert H. Keller had not then recently sold to a certain party a certain piece of real estate, to wit, a house and lot of ground situate in the city of Indianapolis, in the county of Marion, and state of Indiana, for a large sum of money, to wit, for the sum of thirty-five hundred dollars as aforesaid, and that said house and lot of ground were not then of the value of, or worth thirty-five hundred dollars."

By the above averment and negation, the guilt of the appellant is made to depend upon the question whether the house and lot of ground had been sold to a certain party for the exact sum of thirty-five hundred dollars, and whether they were worth that

exact sum, when it should have been made to depend upon whether the appellant had sold said house and lot of ground to any person for said sum, and whether the property was of such value as to amply secure said sum of five hundred dollars alleged to be due.

The second averment is, that appellant represented that said real estate was of the value of thirty-five hundred dollars. It is contended by counsel for appellant that a statement of the value of property is a mere expression of opinion or judgment, about which men may honestly differ, and if there is no fixed market value, an estimate that is too high will not constitute a criminal false pretense.

The question discussed by counsel does not squarely arise upon the averment in the indictment, and hence we do not consider or decide the question, preferring to await until it arises on the evidence, or instruction of the court based upon the evidence.

There is no negation of the third averment, hence, it is admitted to be true, and no evidence would be admissible to prove it to be untrue.

The fourth averment and its negation are insufficient. The negation to the fourth averment does not set out or describe the liens that constituted the prior incumbrances. How was it possible for the appellant to prepare for trial under such an averment and negation? How could he show, on trial, that the liens proved by the state had no valid existence, or had been paid off? He would have no notice of the liens relied upon until the evidence was offered by the state. It would be contrary to well established principles to allow evidence to be given upon a material issue, tending to fasten fraud and falsehood upon the party, without any averment or notice in the indictment of the fact sought to be proved. *The People v. Miller*, 2 Parker C. C., 197.

The fifth averment and its negation are sufficient.

The sixth relates to a future event, and cannot constitute a criminal false pretense. Bishop, in sec. 420 of his *Crim. Law*, vol. 2, p. 230, says:

“And both in the nature of things, and in actual adjudication, the doctrine is, that no representation of a future event, whether in the form of a promise or not, can be a pretense, within the statute, for the pretense must relate either to the past or to the

present." See *Jones v. The State*, 50 Ind., 473, and authorities there cited.

Although some of the averments are sufficient, yet, standing alone and disconnected with the other averments, they are not sufficient to constitute a good indictment.

There is a direct repugnancy in the averments of the indictment, which renders it fatally defective. It is alleged, "that if the said *George W. Boyer* would sell and deliver to the said *Robert H. Keller*, goods, chattels and property to the amount of five hundred dollars, he, the said *Robert H. Keller*, would pay the said *George W. Boyer* therefor, in a promissory note, given and being for the said sum of five hundred dollars, the purchase money due the said *Robert H. Keller* upon the said house and lot of ground, as aforesaid, and to be made payable to the said *George W. Boyer* on the 1st day of March, in the year 1875, and secured by mortgage upon said house and lot of ground," etc.

It is alleged that *Keller* was to pay *Boyer* in a note given and being for the said purchase money, and it is then averred that said note is to be made payable to the said *Boyer*, and secured by a mortgage upon said real estate. In *The State v. Locke*, 35 Ind., 419, the indictment was held bad because it charged that the pretense was made to induce Kiser to become the security of Locke, on a six hundred dollar note, but that, instead of going security, he became a principal, and made a note for six hundred dollars, payable to Locke. The indictment was held ambiguous and uncertain, and an indictment must be direct and certain, as it regards the party and the offense charged. *Whitney v. The State*, 10 Ind., 404; *Walker v. The State*, 23 id., 61; Bicknell's Crim. Prac., 90, 93, 94; *The State v. Locke*, *supra*; *The Commonwealth v. Magowan*, 1 Met. (Ky.), 368; *The People v. Gates*, 13 Wend., 311.

It is a settled rule of criminal pleading, that the offense charged must be proved in substance as charged. This cannot be done in the averment under examination. The two averments are directly repugnant. Both cannot be true. The facts of the case are not correctly stated. It is averred that the note for five hundred dollars had been given to *Keller*, and was secured by mortgage. It was shown upon the trial that, at the time the representations were made, *Keller* had agreed upon a sale of his house and lot of ground, in the city of Indianapolis,

but the deed had not been made, nor had the notes and mortgages been given, and that these facts were known to *Boyer*, and it was then agreed that a note for five hundred dollars should be made payable directly to *Boyer*, and secured by mortgage; and it also appears that this was done. Such proof could not sustain the averments of the indictment.

We are very clearly of the opinion that the indictment cannot be sustained. It is ambiguous, uncertain, repugnant, and defective in its averments and negations.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to sustain the motion to quash. The clerk will give the proper order for the return of the prisoner.

JONES vs. STATE.

(50 Ind., 473.)

FALSE PRETENSES: *Indictment—False token—Property obtained.*

A printed business card, such as ordinarily used by business men, purporting to be the card of a manufacturing firm in C., which is not a genuine business card of such firm, but fraudulent, is a false token.

An indictment for false pretenses, which does not allege that the prosecutor relied on the false pretenses as true, is bad on a motion to quash.

An indictment for false pretenses which does not set out the contract into which the prosecutor was induced to enter by means of the false pretenses, is bad on a motion to quash, because it does not show why or how the prosecutor was induced by means of the false pretenses to part with his property.

The indictment in this case is held to allege facts sufficient to deceive a person of ordinary caution and prudence.

Where a note was obtained by false pretenses, and a few hours afterwards the respondent induced the prosecutor to exchange that note for a second of the same tenor, because the first was written in pale ink, it was held that the evidence was sufficient to sustain the allegation in the indictment which charged the obtaining of the second note by means of the false pretenses, it being all one transaction.

BUSKIRK, J. The appellant was indicted for, and convicted in the court below of, obtaining the signature of Jephtha O. Mayfield, to a note payable to appellant by false pretenses.

A motion to quash the indictment was overruled, and an exception taken.

A plea in abatement was filed, to which a demurrer was sustained, and an exception taken.

A motion for a new trial was overruled, and an exception taken.

A motion in arrest of judgment was overruled, and an exception taken.

The errors assigned are as follows:

1. That the court erred in overruling the motion to quash the indictment.

2. That the court erred in sustaining the demurrer to the plea in abatement.

3. That the court erred in overruling the motion for a new trial.

4. That the court erred in overruling the motion in arrest of judgment.

We will dispose of these assignments of error in the order stated. Did the court err in overruling the motion to quash the indictment? That portion of the indictment material to this question is as follows:

"That Edwin E. Jones, on the 14th day of January, 1875, at said county of Jefferson, feloniously, designedly, and with intent to defraud one Jephtha O. Mayfield, did falsely and feloniously pretend to the said Jephtha O. Mayfield that he, the said Edwin E. Jones, was the agent of a firm of persons in the city of Cincinnati, state of Ohio, doing business under the firm name of 'Mills, Spillmeyer & Co., at Nos. 368, 370 and 372 West Third street, in said city of Cincinnati;' that said firm were largely engaged in the manufacture of a certain implement called 'Herman's Improved Lifting Jack,' and that he, the said Edwin E. Jones, had authority from said firm to sell said lifting jacks for the said firms, and to contract for and in behalf of said firm for the sale of said lifting jacks by said Jephtha O. Mayfield, and did then and there feloniously, designedly, and with intent to defraud said Jephtha O. Mayfield, exhibit to said Jephtha O. Mayfield a certain printed card of said firm of Mills, Spillmeyer & Co., and which said card was and is in the words and figures following: 'Mills, Spillmeyer & Co., manufacturers of Herman's Improved Lifting Jack, Nos. 368, 370 and 372 West Third street, Cincinnati, Ohio. Send orders for Herman's Lifting Jack, in accordance with contract,' and did falsely, feloniously, de-

signedly, and with intent to defraud said Jephtha O. Mayfield, pretend to said Jephtha O. Mayfield, that said card was the genuine card of said firm of Mills, Spillmeyer & Co., aforesaid; that said Jephtha O. Mayfield relied on said pretenses so made to him by said Edwin E. Jones, and by means of said false pretenses the said Edwin E. Jones did then and there feloniously, falsely, designedly, and with intent to defraud said Jephtha O. Mayfield, obtain from said Jephtha O. Mayfield, a note of the said Jephtha O. Mayfield for the sum of four hundred dollars, which note is of the tenor following:

“MADISON P. O., JEFFERSON COUNTY,

“\$400.

January 14, 1875.

“Six months after date I promise to pay to the order of E. E. Jones, at the First National Bank, Indianapolis, Indiana, four hundred dollars, with interest at the rate of — per annum from date, value received, without any relief whatever from valuation or appraisement laws. The drawers and endorsers severally waive presentment for payment, protest, and notice of protest and non-payment of this note. If this note is not paid at maturity, the undersigned agrees to pay the expenses of collection, including attorney's fees.

J. O. MAYFIELD.

“With intent then and there to cheat and defraud him, the said Jephtha O. Mayfield; whereas, in truth and in fact, the said firm of Mills, Spillmeyer & Co., were not engaged in the manufacture of the implement called ‘Herman's Improved Lifting Jack,’ and whereas, in truth and in fact, said Edwin E. Jones was not then and there the agent of said firm of Mills, Spillmeyer & Co., and did not then and there have any authority from said firm to sell said lifting jacks for said firm, and to contract for the sale of the same by said Jephtha O. Mayfield, for said firm, and whereas, in truth and in fact, the said card, so exhibited as aforesaid and hereinbefore set forth, was not then and there the genuine card of said firm of Mills, Spillmeyer & Co., contrary to the form of the statute,” etc.

Section 27, 2 G. & H. 445, reads as follows: “If any person, with intent to defraud another, shall designedly, by color of any false token or writing, or any false pretense, obtain the signature of any person to any written instrument, or obtain from any person any money, transfer, note, bond or receipt, or thing of

value, such person shall, upon conviction thereof, be imprisoned," etc.

The *gravamen* of the crime consists in obtaining the signatures of any person to any written instrument, or in obtaining from any person any money, transfer, note, bond or receipt, or thing of value.

The offense may be committed by two means: first, by color of any false token or writing; second, by any false pretense. The word "token," in its ordinary signification, means "a sign," "a mark," "a symbol." The words "writing" and "written" include printing, lithographing, or other mode of representing words and letters. Sec. 1, subdivision nine, 2 G. & H., 338.

The indictment in the present case attempts to charge that the signature of *Mayfield* was obtained to the note by means of a false token, and by pretending that he was the lawful agent of *Mills, Spillmeyer & Co.*, and had authority for and in behalf of said firm for the sale of said lifting jack.

The first question is, whether the printed card set out in the indictment comes within the meaning of the words "token or writing," used in the statute.

Bouvier's Law Dictionary defines the legal meaning of the word "token" thus: "Token. A document or sign of the existence of a fact. Tokens are either public or general, or privy tokens. They are either true or false. When a token is false, and indicates a general intent to defraud, and is used for that purpose, it will render the offender guilty of the crime of cheating, 12 Johns., N. Y., 292; but if it is a mere privy token, as counterfeiting a letter in another man's name, in order to cheat but one individual, it would not be indictable. 9 Wend., N. Y., 182; 1 Dall., Penn., 47; 2 Const. So. C., 139; 2 Va. Cas., 65; 4 Hawks, N. C., 448; 6 Mass., 72; 12 Johns., N. Y., 293; 2 Dev., N. C., 199; 1 Rich., So. C., 244."

We think the token exhibited by the appellant was a general token, and indicated a general intent to defraud, and when accompanied by the false pretenses alleged in the indictment, was calculated to deceive a person of ordinary intelligence and prudence.

It is very earnestly contended by counsel for appellant that the false pretenses set out in the indictment are not sufficient to constitute the crime attempted to be charged. The first objec-

tion urged to this part of the indictment is, that the word "pretended" is used instead of the word "represented." In our opinion, the objection is untenable. The word "pretense" is used in the statute defining the crime. The word "pretend" is the verb of the noun "pretense." The form of indictment given by Bicknell in his Criminal Practice, p. 341, uses the word "pretense." See Whart. Crim. Law, sec. 2144.

It is next urged that the indictment fails to aver any false pretense which was sufficient to induce a person of ordinary caution and prudence to execute his note for a large sum of money, and we are referred to the following adjudged cases: *The State v. Magee*, 11 Ind., 154; *Johnson v. The State*, 11 id., 481; *The State v. Orvis*, 13 id., 569.

In the first case cited, it was said: "The pretenses must be of some existing fact, made for the purpose of inducing the prosecutor to part with his property, and to which a person of ordinary caution would give credit. A pretense, therefore, that a party would do an act he did not intend to do is not within the statute, because it is a mere promise for his future conduct. Roscoe Crim. Ev., 465. *et seq.*; 11 Wend., 557; 14 id., 547; 3 Hill., 169; 4 id., 9, 126; 19 Pick., 186. These authorities plainly show that any representation or assurance, in relation to a future event, may be a promise, a covenant, or a warranty, but cannot amount to a statutory false pretense."

In the second case cited, the indictment was held to be bad, because it was not averred that the checks were delivered to the prosecuting witness, and were by him received in payment for the harness. The case has but little, if any, application to the present case.

The case of *The State v. Orvis*, *supra*, is in several respects much like the present case. In that case, the indictment was held to be bad, for the reason that it did not appear therefrom that there was any contract or agreement between the defendant and Smith, for the purchase by Smith of an agency to sell the articles mentioned, or that Smith parted with his money for the purchase of an agency to sell, or any other interest in the articles named. In other words, that no connection was shown between the pretenses alleged and the obtaining of the money. In that case, the indictment, after setting forth the false pretenses and negating the averments, concluded as follows:

"By color and means of which said false pretense and pretenses, he, the said Charles B. Orvis, then and there, on," etc., "did unlawfully, feloniously, designedly and falsely obtain from said John F. Smith, forty dollars, then and there being the property of said John F. Smith, contrary," etc.

That portion of the indictment in the case in judgment is as follows:

"And by means of said false pretenses, the said *Edwin E. Jones* did then and there feloniously, falsely, designedly, and with intent to defraud said *Jephtha O. Mayfield*, obtain from said *Jephtha O. Mayfield*, a note of the said *Jephtha O. Mayfield*, for the sum of four hundred dollars, which note is of the tenor following," etc.

There is no averment that the said Mayfield was induced, by means of said false token and pretense, to purchase of said Jones the right to sell said lifting jack, and that in consideration of said purchase, he executed the note set out in the indictment. In other words, there is no connection shown between the false pretenses alleged and the obtaining of said note. It is not shown why or upon what consideration or for what purpose the note was executed. Suppose Jones did exhibit the card of the said firm as genuine, when it was false and forged, and suppose he did pretend that he was the lawful agent of said firm, and had authority to make contracts in the name and on behalf of said firm for the sale of said lifting jack, when, in truth and in fact, he was not such agent and had no authority to contract in the name and on behalf of said firm. The facts assumed to exist wholly fail to show any consideration for the note, or any reason why it was executed. The necessary connection between the false pretenses and the execution of the note would have been shown by an averment that the said Mayfield, by color and means of said false pretenses and in reliance upon the same as true, had been induced to purchase from the said Jones, as such agent, the right to sell said machine, for the sum of four hundred dollars, and in consideration thereof, had executed the said note.

It is also claimed by counsel for appellant that the note set out in the indictment is not the one that was obtained by the false pretenses alleged. The facts are these: After Jones had obtained one note from Mayfield, he went back to his house, and

upon the ground that such note and contract were written in pale ink, induced Mayfield to surrender up the contract. Thereupon a new note and contract were drawn and executed. They were the same as those surrendered, except written in different and better ink. The execution of the first note was obtained by means of the false pretenses alleged, and the second, by means of the first note. The point is not entitled to much consideration. There was no consideration for the second note, except that which supported the first. It was, in substance, one transaction, and the fact that the note set out in the indictment was executed a few hours after the first cannot change its legal character.

We think the pretenses alleged in the indictment were sufficient to deceive a person of ordinary caution and prudence. It is true, that many persons would not have been deceived thereby. They might, by reason of their long experience and greater shrewdness, have detected the fraud, or, having their suspicions excited, they would have communicated to the firm in Cincinnati. But laws are not made for the protection of the shrewd and business man only, but for the entire community. In the enactment of criminal laws, the legislature adopts, as a standard of intelligence, neither the highest nor the lowest, but the medium. The law only requires the exercise of ordinary caution and prudence. Business could not be transacted without placing confidence in the representations of persons engaged therein. While the law does not encourage blind confidence, it does not expect those engaged in the ordinary affairs of life to possess the shrewdness and cunning of the practiced detective. The question therefore is, in such a case as the present, what would a man of ordinary intelligence and caution have done under the facts and circumstances surrounding this transaction? Would such a man have believed and acted upon such pretenses? If he would, the case is made out.

For the failure to allege that Mayfield relied upon such pretenses as true, and upon the faith thereof, purchased from Jones the right to sell such "lifting jack," and in consideration thereof, executed the note set out in the indictment, we must hold the indictment bad.

The judgment is reversed, and the cause remanded, with directions to the court below to sustain the motion to quash the

indictment. The clerk will give the proper order for the return of the prisoner to the jail of Jefferson county.

MARANDA vs. STATE.

(44 Tex., 442.)

An indictment for false pretenses which does not allege that the respondent "knowingly" made the false pretenses is bad on a motion in arrest of judgment.

MOORE, A. J. The motion in arrest of judgment should have been sustained. Knowledge of the false pretense by means of which money or property is fraudulently obtained is an essential constituent of the offense with which appellants are charged. Without proof that they knew that the pretense was false, evidently they should not be convicted. And although the word "knowingly" is not one of the statutory words used in defining the offense, still as the offense, as defined by the statute, clearly requires that it shall be proved, we think, by the rules of correct pleading, it should be averred in the indictment. And so it is held by courts of the highest authority and standard commentators. (*Regina v. Philpotts*, 1 Car. & Kir., 112; 2 Bish. Cr. Proc., sec. 172.) The necessity for such an averment in the indictment has been clearly recognized by this court in the opinion of Mr. Justice Devine in the case of *State v. Levi* (41 Tex., 563). The judgment is reversed and the cause remanded.

Reversed and remanded.

WATERMAN vs. PEOPLE.

(67 Ill., 91.)

FORGERY: *Letter of introduction.*

A letter of introduction directed "to any railroad superintendent," bespeaking courtesies toward the bearer, has no legal validity and affects no legal rights, and is not a subject of forgery.

BREESE J. This was an indictment in the criminal court of Cook county, against plaintiff in error and one William E. Dundee, for forgery.

The writing alleged to have been forged was as follows:

THE DELAWARE & HUDSON CANAL COMPANY,
H. A. FONDA, *Albany and Susquehanna Department,*
Superintendent. ALBANY, N. Y., *August 23, 1873.*

To any railroad superintendent: The bearer, T. H. Wiley, has been employed on the A. & S. R. R. as brakeman and freight hand. Any courtesies shown him will be duly appreciated, and reciprocated, should opportunity offer.

Very resp'y and truly yours,

H. A. FONDA, *Supt.*

The indictment framed upon this writing contains not a single averment of any extrinsic matter which could give the instrument forged any force or effect beyond what appears on its face. No connection is averred between the party to whom the writing is addressed and the Chicago, Rock Island & Pacific Railroad Company. Nor is it averred that the prisoner attempted to pass the writing upon that company.

The writing, if genuine, has no legal validity, as it affects no legal rights. It is a mere attempt to receive courtesies on a promise, of no legal obligation, to reciprocate them.

We are satisfied that the writing in question is not a subject of forgery, and no indictment can be sustained on it, and no averments can aid it.

It is a mere letter of introduction which, by no possibility, could subject the supposed writer to any pecuniary loss or legal liability. As well remarked by the prisoner's counsel, courtesies are not the subject of legal fraud.

The motion in arrest of judgment should have been allowed. To refuse it was error.

As no prosecution can be founded on the writing, the judgment must be reversed, and the prisoner discharged from custody.

Judgment reversed.

WILLIAMS vs. STATE.

(51 Ga., 535.)

FORGERY: *Imperfect instrument — Indictment.*

An indictment charging respondent with forging a bank check payable to the order of —, is bad on demurrer. A check not payable to bearer, or to the order of a named person, is so imperfect that it could not defraud anyone.

An indictment for forgery, which does not allege who was intended to be defrauded by the forged instrument, is bad on demurrer.

THE defendant was indicted for the offense of forgery. In the indictment he was charged with falsely and fraudulently making and signing a certain false, fraudulent and forged bank check, in the words, letters and figures, printed and written as follows, to wit:

“No. 76.

SAVANNAH, GA., *May 24th, 1873.*

“Central Railroad and Banking Co., pay to the order of — three hundred and sixty dollars.

(Signed)

“J. LAMAR.”

The defendant was also, in one of the counts of the indictment, charged with having falsely and fraudulently uttered and published as true the forged and counterfeited check above described, knowing the same to be counterfeited and forged, with intent to defraud, but it is not alleged whom he intended to defraud. On arraignment, the defendant demurred, in writing, to the sufficiency of the indictment, which demurrer was overruled, and the defendant excepted. The case then proceeded to trial, and the jury found the defendant guilty on the second count in the indictment.

The exceptions to the charge of the court, and refusal to charge as requested, are substantially embraced in the exception to the overruling of the demurrer, and will be considered together.

1. The demurrer to the indictment was on the ground that the bank check alleged to have been forged was incomplete, and could not have defrauded anyone. The check was not payable to bearer, or to the order of any named person, and therefore was incomplete as a bank check, and could not have defrauded the bank or the drawer of the check.

2. In the case of the *People v. Galloway*, 17 Wend., 540, the

cases bearing upon this question were reviewed, and the principle to be deduced from them is, that if the instrument alleged to have been forged is so imperfect and incomplete that no one can be defrauded by it, then the defendant cannot be convicted of that offense.

3. Besides, it is not alleged in this indictment that the defendant intended to defraud any person by the making, signing, uttering or publishing of the instrument described in the indictment.

The indictment alleges that it was done by the defendant with intent to defraud, but whom he intended to defraud is not alleged. The court erred in overruling the demurrer to the indictment.

Let the judgment of the court below be reversed.

BROWN vs. PEOPLE.

(66 Ill., 314.)

FORGERY: *Variance — Tenor.*

An indictment for forging a note purported to set forth the note according to its tenor. The signature to the note, as stated in the indictment, was, Otha ^{his} × Carr. The note offered in evidence was signed Oatha ^{his} × Carr. ^{mark.} Held, a fatal variance, and the note inadmissible.

The word "tenor" binds the pleader to the strictest accuracy.

Where the record does not show whether inadmissible evidence which was objected to was admitted or not, but the court can see from the record that if such evidence was not admitted, there is nothing to sustain the verdict, the judgment and verdict will be set aside. If the objectionable evidence was admitted, that is error. If it was not, the verdict is erroneous because there is nothing to support it. In either case there is error.

WALKER, J. This was an indictment for forgery, found by the grand jury of Warren county against plaintiff in error and one Robinson.

Plaintiff in error was arrested, arraigned, and tried by the court and a jury, found guilty and sentenced to confinement in the penitentiary at hard labor for one year. To reverse that judgment, the record is brought to this court on error, and various grounds are urged for reversal.

On the trial, the prosecution offered in evidence the instru-

ment alleged to have been forged, when accused objected on the ground of a variance between the indictment and the instrument offered.

The indictment contained two counts, in the first of which it is averred that accused "unlawfully and feloniously did falsely, fraudulently make and forge a certain promissory note for the payment of money, and the signature and mark of one Otha Carr to said promissory note, purporting to be made and executed by said Otha Carr. The tenor of which promissory note is as follows, to wit:

"\$150.00.

BERWICK, Ill., Aug. 29, 1870.

"Six months after date, for value received, I promise to pay J. B. Drake, or order, one hundred and fifty dollars, with interest at 10 per cent. per annum till paid.

"Witness by H. N. Brown.

OTHA ^{his} × ^{mark.} CARR."

The second count avers the uttering of a promissory note, knowing it to be false, fraudulent, forged and counterfeit, "the tenor of which counterfeited promissory note is as follows, to wit: Then follows the copy of a note in all respects similar to that set out in the first count of the indictment.

The note offered in evidence purports to have been signed "Oatha ^{his} × ^{mark.} Carr." The difference in the manner of spelling the signature as described in the indictment, and of that to the instrument offered in evidence, is the variance relied on by defendant below. In Wharton's Am. Cr. Law, vol. 2, sec. 1471, 6th ed., it is said, an omission of a part of the date is fatal under such an averment. It is further said, "but where the indictment charges the note to be in purport and effect following, it was held that 'I promise' was an immaterial variance from 'I promised.' It would seem, however, that the distinction taken in the last case between the averments 'words and figures following,' and 'tenor and effect,' if such was actually intended, is not in conformity with precedents. The word 'tenor' binds the pleader to the strictest accuracy." And for this last proposition, reference is made to *Rea v. Powell*, 2 East's Pleas to the Crown, 976. Again, the same author says, in sec. 1476, "An indictment for forgery of an instrument, professing to set it out according to its tenor, should give the names, in describing the instrument, spelled as they appear spelled in the original." And this rule

appears to be supported by authority, and we recognize it as being correct. The name is differently spelled in the indictment and the note offered in this case, and is manifestly false within the rule thus announced.

We have thus far considered the case as though the note was read in evidence, although the record only states that the people's attorney offered the note in evidence, to which defendant's attorney objected, on the ground of variance between the note described in the indictment and the note offered. Although the record fails to show that the note was read to the jury, still the question of variance would perhaps arise in another trial, and hence we have chosen to decide the question.

But if the note was not read in evidence, then the evidence wholly fails to support the verdict. In such a case there is nothing to support the finding. In either case, however, the judgment must be reversed. If it was read in evidence, it was error, because of the variance, and if it was not read, then there is error, as the verdict and judgment have no basis on which to rest.

The judgment of the court below is reversed, and the cause remanded.

Judgment reversed.

MILLER vs. STATE.

(51 Ind., 405.)

FORGERY: *Evidence — Election.*

On the trial of an indictment containing two counts, one of which alleges the forging of a draft and the other the uttering and publishing of the forged draft as true, it is not error for the court to refuse to require the prosecutor to elect on which count he will proceed to trial. This is a matter in the discretion of the trial court.

The uttering and publishing of a forged instrument by the respondent raises no presumption of law that he committed the forgery.

On a charge of forgery the uttering and publishing of the forged instrument are circumstances to be weighed by the jury in connection with other evidence in the case.

WORDEN, J. The appellant was indicted for forgery; the indictment containing two counts. The first charged him with having forged the name of Calvin Mullen upon the back of a draft drawn by the First National Bank of Xenia, Ohio, upon the First National Bank of Cincinnati, Ohio, for the sum of

eight hundred dollars, payable to the order of said Calvin Mullen.

The second count charged him with having uttered and published as true a forged and counterfeited indorsement of said draft, purporting to be the indorsement upon the same of the name of said Calvin Mullen.

The defendant moved to quash each count, but the motion was overruled. Each count, it seems to us, was good.

The defendant moved to require the prosecutor to elect on which count he would put the defendant on trial, but the motion was overruled. Doubtless the court might, in its discretion, have required the election to have been made, but there was no error in refusing to do so. *Mershon v. The State*, 51 Ind., 14.

On the trial, there was a general verdict of guilty, and the defendant was sent to the state's prison for the term of eight years.

Several reasons were stated for a new trial, but we deem it necessary to notice one only. The court instructed the jury, amongst other things, as follows:

"If it is shown that the endorsement is forged, and that the defendant had in his possession and passed said check, with the forged indorsement thereon, the presumption arises that the defendant made the indorsement, and unless that presumption is explained and rebutted, it will be sufficient evidence to warrant you in coming to the conclusion that the defendant made such indorsement."

The charge thus given was radically wrong. The draft or bill of exchange, being indorsed by the payee in blank, would pass from hand to hand by delivery, without any further indorsement, so as to vest the title in each successive holder. The count charging the defendant with having uttered and published the forged indorsement as true, necessarily contained the allegation that the defendant knew the indorsement to have been forged at the time he uttered and published it as true. 2 G. & H., 446, sec. 30. The *scienter* is a necessary ingredient of the offense charged in the second count, and the allegation must be supported by competent evidence.

Now, it might happen that a bill, thus apparently indorsed by the payee in blank, might pass through innocent hands, and it cannot be law that each person through whose hands such a bill might pass, the indorsement turning out to be forgery, is to be

presumed *prima facie*, to have made the forged indorsement. If the instruction be correct, then it follows that, while on a charge of uttering and publishing as true any such forged indorsement, a party could not be convicted without averment, and proof of the *scienter*, yet he might be convicted on a charge of the forgery of the indorsement without any other proof than the mere uttering and publishing as true of the forged indorsement.

We do not think it can be laid down as a rule of law that the uttering and publishing as true of a commercial instrument, with the name of the payee forged thereon, raises a presumption that the person uttering and publishing is guilty of forging the indorsement. On a charge of the forgery of the name, the uttering and publishing are circumstances to be considered by the jury, with any other evidence bearing on the question of the forgery, and what weight shall be given to the uttering and publishing is to be determined by the jury, in the same manner as they determine the weight of other evidence in criminal cases.

The judgment below is reversed, and the cause remanded for a new trial.

The clerk will give the proper notice for a return of the prisoner.

PORTER *vs.* STATE.

(51 Ga., 300.)

GAMING: *Things of value.*

Chips and checks redeemable in money by the dealer at a gambling table are things of value, within the meaning of a statute against gaming.

MCCAY, J. The statute makes gaming to consist of playing, etc., "for money or other thing of value." Why are not "checks," "chips," and things of this character, just as much things of value as bank notes? They are both of them only the representatives of value. If a check is good when presented to the banker or dealer for twenty-five cents or one dollar, according to its stipulated value, we are unable to see how it fails to come within the statute, any more than if the keeper of the bank had written his formal promise to pay, or the bet had been for as much money as the check or chip represents. In fact, that is

the truth of the case. The bet is really for money, and the check is merely to aid in keeping the account as well as for convenience.

We suspect this case is only brought here for delay, and not really to test the legality of the conviction, and we are sorry we are not able to add to the penalty fixed by the judge, for this trifling with the public tribunals.

Judgment affirmed.

STATE vs. HENDERSON.

(47 Ind., 127.)

GAMING: *Betting on election.*

Betting upon the result of an election is not gaming.

OSBORN, J. This case is brought here under section 119, 2 G. & H., 420. The point reserved was the ruling of the court upon the sufficiency of the second paragraph of the answer filed by the appellee.

The bill of exceptions shows that the appellee was indicted by the grand jury of Morgan county, for betting and wagering upon the result of the election of governor in 1872; that he appeared and filed an answer of two paragraphs. The second alleged "that before the indictment was by said grand jury found or presented, said grand jury caused the defendant to be duly subpoenaed before them, to testify as a witness to the facts and matters alleged in said indictment; and that he was by said grand jury then and there, before the finding or presenting of said indictment, compelled to testify, and did testify, as a witness in said cause, and then and there to disclose as such witness all the facts and matters alleged in said indictment, and to prove the said offense charged in the said indictment."

To this paragraph the state demurred, on the ground that it did not state facts sufficient to constitute an answer. The demurrer was overruled, and the state excepted, and reserved the point of law for the decision of this court. A replication in denial was then filed, and the cause was submitted to the court for trial, who found the appellee not guilty on the defense, as stated in the second paragraph of the answer.

The paragraph of the answer in question was predicated upon section 89, 2 G. & H., 410, which provides, that any person called as a witness to testify against another for gaming is a competent witness to prove the offense, although he may have been concerned as a party, and is compelled to testify as other witnesses, but he shall not be liable to indictment or punishment in any such case.

In our opinion, the answer is bad. To exempt a person from prosecution or punishment on the ground that he has been compelled to testify as a witness, under section 89, *supra*, it must appear that he was compelled to testify against another for gaming. This answer shows that the appellee was compelled to testify touching a wager on the result of an election, and not to prove the offense of gaming. Betting upon the result of an election is not gaming; an election is not a game. *Woodcock v. McQueen*, 11 Ind., 14; *McHatton v. Bates*, 4 Blackf., 63.

In our opinion, the decision of the court below overruling the demurrer to the second paragraph of the answer was erroneous.

As this court is not authorized to reverse a judgment of acquittal in a criminal prosecution, the judgment of the said Morgan circuit court is affirmed, at the costs of the appellee.

Judgment affirmed.

STATE vs. BOOK.

(41 Iowa, 550.)

GAMING: *Playing billiards — Keeping gambling house.*

Under a statute which provides that to "play at any game for any sum of money or other property of value" is gambling, playing at billiards where the loser pays for the game is gambling.

The owner of a billiard table which is used with his knowledge and consent for playing billiards, on an understanding between the players that the loser shall pay for the game, is guilty of keeping a gambling house.

MILLER, C. J. The evidence shows that the defendant kept a place, as charged in the indictment, where persons resorted for the purpose of playing games of billiards, pin pool, etc., and where the defendant also kept cigars and drinks for sale; that it was the custom or habit of persons resorting to this place, to play billiards and pin pool, "and the losing party to pay for the

game;" the price of pin pool was five cents a cue, and billiards twenty cents a game. Sometimes, too, the man that got beat would treat. The evidence also leaves no doubt of the fact that the defendant knew the games of billiards and pin pool were played in the manner the evidence shows; in other words, that it was usual, in fact universal, for them to play those games with the agreement or understanding that the loser should pay for the games, and that they were in fact so played.

I. The court, among other things, charged the jury that if they found the above enumerated facts, they would be authorized to find the defendant guilty under the indictment.

It is urged by counsel for appellant that these facts do not constitute the crimes charged in the indictment. In other words, that playing the game of "pin pool" with the agreement that the losing party shall pay for the game, and he did so in fact, is not gambling, and, therefore, to suffer such playing in a house or place under the control or care of the defendant, does not constitute the crime charged.

The statute provides that to "play at any game for any sum of money or other property of any value" is gambling. (Code, sec. 4028.) Now, it is clearly shown, and not disputed, that the defendant kept certain tables on which divers persons were in the habit of playing at what is called the game of "pin pool." That this play is a "*game*" there is no dispute, and there is no controversy about the fact that for the use of the tables and other instruments of the game, the defendant charged and required the player to pay a certain sum of money for each cue (whatever that is). When, therefore, two or more persons played this game, they became jointly or severally bound to pay the sum or sums of money chargeable therefor. It is plain that if they play the game or games in order to determine which of the players shall pay the entire sum or sums which they would be jointly or severally bound to pay, they play for the sum each one would be bound to pay, and it does not change the matter that they play the game in advance of paying therefor. The principle is the same as if the money had been staked or put up before the game was played. It is gambling in the one case as well as in the other. Nor is it any less gambling that the sum of money played for is small. To "play at *any* game for *any* sum of money," however small, comes within the statute.

This view is sustained by *The State v. Leighton*, 3 Foster (N. H.) 167; and *Ward v. The State of Ohio*, 17 Ohio St., 32, both cases being precisely in point. In the former, the learned judge delivering the opinion of the court says: "The defendants made a profit from the use of the billiard tables; for the 'hire' of them they were paid a shilling a game. The persons who resorted there played for the hire. In substance they played for a shilling a game. The loser paid and the winner received the sum. By an understanding among the players, the money was to be applied towards defraying the expenses of the tables; but still it was money won at play and upon the chances of play." The same doctrine is held also in the case last cited. In *Harbaugh v. The People, etc.*, 40 Ill., 294, and *Blewitt v. The State of Mississippi*, 34 Miss., 606, a contrary doctrine is held under the statute of those states. Under our statute, we deem the former the correct view, and that any different construction would not be warranted.

II. After the jury had been out for some time, they came into court and submitted to the court, in writing, the following question:

"Judge Reed: Will you state for our information if, in taking the surrounding circumstances, such as Book's presence while the games were being played, and receiving the money, we should conclude that he knew how the games were being played and played unlawfully, should we find him guilty in connection with this evidence? H. M. Cook, Foreman."

Which the court answered as follows:

"If you find, from the evidence, that parties who played on defendant's billiard tables, in his place of business, did so with the understanding that the loser should pay to defendant the amount charged all the members of the party for the use of the table, and that the defendant knew that they were playing under such arrangement, and permitted them so to play, you should find the defendant guilty."

The objection urged to this instruction is, that it directs the jury as to the force or effect of the evidence. We do not so understand it. It simply tells the jury that if, "from the evidence," they find certain *facts*, then they should find the defendant guilty. There was no error in the instruction in this respect, nor in any other, as we have already seen.

The judgment of the district court will be affirmed.

NOTE. — *People v. Sargeant*, 8 Cow. (N. Y.), 139, is also an authority that playing at billiards, where the loser pays for the game, is not gambling.

CONYERS vs. STATE.

(50 Ga., 103.)

Permitting minor to play billiards without consent of guardian — Burden of proof.

On the trial of an indictment for permitting a minor to play billiards without the consent of his parents or guardian, the burden of proof is on the state to show that the minor did not have the consent of his parents or guardian.

MCCAY, J. Whilst it is certainly true, as a general rule, that the burden of proof is upon the party who holds the affirmative of a proposition, yet there are many instances in which a contrary rule obtains. Our code, 1873, section 3758, declares that "if a negation or negative affirmation is essential to a party's case, the proof of such negative lies upon the party affirming it." The test is, Does the negative form an essential ingredient in the thing sought to be established? Does the mind fail to agree to the proposition insisted on, so long as the negation remains unproven? If so, the proposition is not made out, and the party asserting the negation must prove it.

In criminal cases, the law requires that the state shall prove all the essential facts entering into the description of a crime, and, except in a very few special cases, the defendant cannot be put upon his defense, until the state has shown affirmatively every such act. In *Elkins v. The State*, 13 Ga., 435, this court lays down the rule very broadly, and asserts that whatever is made by the statute an essential part of the offense, must be set out in the indictment and proven by the state. The want of consent by the parent or guardian is the very gist of this crime. It is not unlawful for men to play billiards. It is not unlawful even for minors to play, if their parents or guardians consent. The want of the consent is the very essence of the offense. There is a class of negations which it is almost impossible to prove affirmatively. Where the field to be covered by the evidence is so broad as that, the burden would be intolerable upon the public.

to afford the time necessary for hearing this proof, as where it is only possible to prove that one was not present, by examining a large number of persons who did not see him, or where the proof that one did not do a thing can only be established by proof following him from movement to movement, through a considerable time. But there are negations that are just as easily proven as an affirmative, as where the negation depends upon a moment of time and a particular place, or is within the knowledge of a single person. In the former class, even, the general rule that the prosecutor in criminal cases must prove all the ingredients of the crime, has, in some cases, been relaxed. As in prosecutions under the English game laws, where one may kill game if he has one of a large number of qualifications, it has been held that it was not necessary for the crown to go to expense and the public to suffer the inconvenience of proving the absence of each of the required qualifications, especially (and this is perhaps the true point on which the exception turns) if the facts lie peculiarly in the defendant's knowledge.

This was the holding of the court in *The King v. Turner*, 5 Mau. & Sel., 206, and it seems to have been followed in 1 Ry. & Moo., 159; 1 Car. & P., 508, and by several other English and many American cases, though it is certainly true that the old cases even on the game laws, are different. 2 Ld. Raym., 1415; 1 Stra., 497; 2 Com., 525; 1 T. R., 125; 1 East, 643; 1 id., 639, and the courts have not always kept in mind the distinction between cases where the negative is part of the description of the offense, and where it is by provision of a subsequent section or by a subsequent act; 3 Dev., 299; 3 B. Mon., 342; 34 Me., 293; 12 Barb., 26; N. H., 8. Our own court has made the exception in the case of an indictment for retailing spirituous liquors without license. In the case of *Sharp v. The State*, 17 Ga., 290, this court held that if the selling of spirituous liquors was proven, the *onus* was shifted to the defendant, and that it was not necessary for the state to prove the want of license.

This is a strong case, for the want of the license is a part of the description of the offense. We are free to say that we do not think the reasoning of the court in that case very sound, since it is said there that by his plea of "not guilty" the defendant admits the selling, and asserts that he has license — a line of reasoning which is, as it seems to us, untrue, since the

plea of not guilty denies the whole charge. But the case may be sustained on another ground, and by authority. The license is a written authority to the dealer to sell, and the presumption is that he has it in his possession. It is peculiarly within his knowledge. The negative *cannot* be shown conclusively by the state. It could only be proven that no such license was recorded; but the defendant might have the license and be not guilty, though the license was not recorded. All the proof in the *power* of the state would be inconclusive, to wit: that no such license was issued. The license is in writing, and cannot be proven by parol, and it is in the defendant's possession, if it exists, and on this ground there are many cases making this special crime an exception to the general rule. See the cases, both English and American, above referred to in 1 Bennett's Criminal Cases, and notes, 306, 319; though there are many cases of high authority to the contrary; 24 Pick., 380, and the cases there cited. But undoubtedly the general rule is that in criminal cases the burden of showing all the facts necessary to make out the defendant's guilt is upon the state.

In rape, the proof must show that the act was against the will of the female. In robbery, that the taking was against the consent of the person robbed; in larceny from the person, that the taking was without the knowledge of the possessor in the case; opprobrious words, that they were *unprovoked*, and in the various acts of trespass against property, as cutting wood, etc., on another's land, that they were without the owner's consent. The books are full of illustrations of the position we have asserted, to wit: that if in order to make the defendant guilty, it be necessary to show a negative the burden of showing it is upon the state. *Harvey v. Towars*, 4 Eng. L. & E., 531; *May v. The State*, 4 Ala., as when the defendant was indicted for keeping a grey hound, not being a person qualified. 1 Str., 66. In the same volume is a case for profane swearing, under the act of 6 and 7 Will. III. The act put a penalty of one shilling upon a servant, and two shillings on every other person. The conviction was quashed because it was not proven that the defendant was not a servant. So in *Ree v. Allen*, 1 Moo. C. C., 154, and *Ree v. Rodgers*, 2 Camp., 634, in an indictment for killing deer on the ground of another without his consent, it was held that the prosecution must prove the want of consent. See, also,

2 Greenl., 228; 2 Car. & P., 45; 2 Jones (N. C.) 276; where the doctrine is discussed. See, also, 10 East, 211, where it was held that the burden was on the crown to show that the defendant had not taken the sacrament. In 5 Rich., 57, that a practicing physician had no license; that one was not qualified to vote: 9 Met., 286.

The case at bar, we think, comes within the general rule. The consent of the parent is not required by the statute to be in writing, and does not, therefore, as in the case of license to sell, lie peculiarly within the knowledge of the defendant. That the consent was not given is as well known to the parent or guardian as it is to the defendant. We are, for these reasons, of the opinion that the conviction was wrong, under the proof. There was no evidence of the want of consent, and this was a material ingredient in the offense charged.

Judgment reversed.

ZOOK vs. STATE.

(47 Ind., 463.)

GAMING: *Indictment.*

Under a statute which prohibits the keeper of a billiard table from allowing a minor to play on it, and inflicts a fine for each game allowed to be played, an indictment which does not allege that a game was played, or name the person with whom the minor played, or give any reason for not naming him, is bad, on a motion to quash.

PETIT, J. This was an indictment for allowing a minor to play billiards, in violation of the following section of the statute, Acts of 1873, p. 30:

"Sec. 1. That if any person owning, or having the care, management or control of any billiard table, bagatelle table or pigeon hole table, shall allow, suffer or permit any minor to play billiards, bagatelle or any other game at or upon such table or tables, he shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall, for each game so allowed, suffered or permitted to be played, be fined in any sum not less than five dollars, nor more than fifty dollars."

A motion to quash this indictment was overruled, and exceptions taken; and this ruling is assigned for error.

The objections urged to the indictment are, that the person with whom the minor played billiards is not named, nor is any reason or excuse given for not naming him; and that the indictment does not show or charge a game was played.

This indictment is not specific and certain in contemplation of law, so as to enable the defendant to prepare for his defense, because it does not name the person with whom the minor played, and a conviction on this indictment would not be a bar to another indictment charging that the minor played with a person named.

The statute makes it penal to allow a minor to play a game. The indictment does not charge or show that the minor did or was allowed to play a game. We hold that the objections to the indictment are well taken. 2 G. & H., 410, 412; *Quinn v. The State*, 35 Ind., 485; *Whitney v. The State*, 10 id., 404; *The State v. McCormick*, 2 id., 305; *The State v. Noland*, 29 id., 212. Many other cases are cited, both in this and other states, to sustain the position taken, but we deem it unnecessary to refer to them.

The indictment is bad, for not alleging that a game was played, and in not naming the person with whom it was played, or giving a reason why he was not named.

The judgment is reversed, with instructions to sustain the motion to quash the indictment.

EX PARTE LE BUR.

(49 Cal., 159.)

HABEAS CORPUS.

Federal prisoner in state prison.

A person who has been convicted of a crime against the United States by a federal court, and confined in the prison of the state with the consent of the state, is deemed to be in the custody of the federal authorities.

Release of federal prisoners by state courts.

The courts or judges of the state have no authority to release a prisoner upon a *habeas corpus*, when the prisoner is in the custody of the authorities of the United States, pursuant to a judgment of conviction by a federal tribunal of exclusive jurisdiction in the case.

APPLICATION to Mr. Chief Justice WALLACE to be discharged on *habeas corpus*, from imprisonment in the state prison of the state of California.

The return of Ramualdo Pacheco, warden of the state prison, shows that in the year 1868, the prisoner was convicted in the circuit court of the United States for the district of Oregon, of the crime of aiding or being accessory to, and of robbing the United States mails, and sentenced to be imprisoned, at hard labor, for the term of ten years; that the prisoner is detained by the said Pacheco, under and in pursuance of certified copies of the judgment and order of commitment, and of a certified copy of a message from the Hon. O. H. Browning, secretary of the interior, to the United States marshal for the district and state of Oregon, designating the state prison of California as the place of confinement, and ordering the marshal to remove the prisoner to the state prison at San Quentin. The judgment, after naming the term of confinement as above stated, concluded with this order:

"It appearing to the court that there is no law of the state of Oregon authorizing persons sentenced to be imprisoned by this court, to be confined in the penitentiary of the state, it is ordered that the sentence of imprisonment hereby imposed upon the defendant be executed by imprisoning him, for the term aforesaid, in the county jail of Multnomah county, in the state aforesaid, until further order."

The commitment recited the order in the judgment, and directed the marshal to deliver the prisoner "to the keeper of the county jail of said county of Multnomah, in the state aforesaid, there to be safely kept by him, the said keeper, in close confinement until he be discharged by due course of law, or until further order."

The telegraphic message from the secretary of the interior was as follows:

"WASHINGTON, *March 3, 1869.*

"Received at Portland March 3, 1869.—9 A. M.

"To ALBERT ZIEBER, Marshal U. S.:

"Transport to California penitentiary * * William Le Bur, * * (Signed) O. H. BROWNING, *Secretary.*"

The copies of the judgment, order of commitment, and telegram, were certified by the clerk of the court.

F. M. Piale, for petitioner:

The return does not show any authority for detaining the prisoner. The warden is the agent of the state, not of the United States, and it appears by the judgment and the order of commit-

ment, that the prisoner was ordered to be confined in the county jail of Multnomah county, Oregon, "until further order." That means until further order of the court, for the power to designate the place of confinement is a judicial function, and the designation of the place is a necessary part of the sentence, as much so as the fixing of the term. The secretary of the interior, being an executive officer, has no power to change the place of imprisonment designated by the court. No order was ever made by the court removing the prisoner to this state, and, therefore, he is not lawfully detained here. But, if the secretary of the interior be held to have the power to change the place, there is no evidence that he has done so, for the telegram is not authenticated by the seal of the secretary's office, nor certified by any one having authority to attest its authenticity.

Walter Van Dyke, United States District Attorney, for respondents:

A state court cannot issue the writ of *habeas corpus*, where the party imprisoned is in custody under the authority of the United States. If he is wrongfully imprisoned, the federal tribunals alone can release him. *Ableman v. Booth and the United States*, 21 How., U. S., 506.

The prisoner is in the custody of the respondent under the authority of the United States. The telegram of the secretary of the interior is sufficient to authorize the imprisonment of the prisoner by the respondent. It is of necessity without a seal, for such a message cannot be transmitted with a seal. The secretary has authority to designate places of confining prisoners. 2 Bright. Dig. of U. S. Laws, p. 164, sec. 56; *id.* p. 182, sec. 55.

The power of designating the place is an executive function merely, not judicial. When the sentence is passed by the court, its power over the prisoner is exhausted, and all that remains is to execute the sentence. That must be done by executive officers. To hold that the place cannot be changed without an order of the court, would be to render executive officers powerless to act in cases of emergency, such as fires.

WALLACE, C. J. The prisoner is detained in custody by the authorities of the government of the United States, by virtue of the judgment rendered by the United States court in Oregon, and it is not claimed that the term of his imprisonment has ex-

pired. The circumstance that he is imprisoned at the state prison, and in the keeping of its warden, is of no import in this respect, for these are but the agencies and means of his confinement, adopted by the United States by the consent of the state.

The petitioner being a prisoner held by the authorities of the government of the United States, by virtue of the judgment of a federal court of exclusive jurisdiction in the case, it is my duty under the statutes of the state to remand him. Penal Code, sec. 1486.

It is there provided that if the time during which a party may be legally detained in custody has not expired, he must be remanded if he appear to be detained in custody "by virtue of process issued by any court or judge of the United States, in a case where such court or judge has exclusive jurisdiction."

In *Ableman v. Booth*, 21 How., U. S., 523, the question of the power of the state courts to deal with persons detained as the petitioner is, was discussed by Mr. Chief Justice Taney with his accustomed ability, and it was there held that when the return to the writ is made, and the state court or judge is judicially apprised that the party is in custody under the authority of the United States, they can proceed no further. "They then know," says the chief justice, "that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of *habeas corpus* nor any other process issued under state authority can pass over the line of division between the two sovereignties. He is then within the domain and exclusive jurisdiction of the United States. If he has committed an offense against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress."

The petitioner must be remanded, and it is so ordered.

WRIGHT *vs.* PEOPLE.

(33 Mich., 300.)

ASSAULT WITH INTENT TO MURDER: *Written verdict construed — Practice.*

In a prosecution for assault with intent to murder, the jury brought in the following written verdict: "We find the prisoner, John D. Wright, guilty of assault with intent to kill William Wagner, as charged in the information;

also, that the shooting done by Wright was done under great provocation, and we would recommend the prisoner to the mercy of the court." The judge, after reading the verdict aloud, said, "you find the prisoner guilty as charged in the information," to which the jury nodded assent; and the verdict so given was recorded as a general verdict of guilty, and the jury discharged. On these facts it was *held*, that the finding of the jury could not be construed as a finding that the prisoner was guilty of anything more than assault and battery, and that the entry of the general verdict of guilty in the record was unauthorized.

ERROR to St. Clair Circuit.

Wright was tried on a charge of assault with intent to murder one Woodward, *alias* Wagner, at Port Huron. The jury, having received the charge of the court, retired in charge of an officer, and shortly afterwards returned into court for further instruction as to whether the prisoner could be convicted under the information of assault and battery. The charge being again read to them (which distinctly instructed them that if the killing, in case death had resulted, would have been anything less than murder, the defendant was not guilty of the complete offense charged, but was at most guilty of assault and battery only, and that he might be convicted of that offense), they again retired. At about two o'clock in the morning the jury again returned into court, and being asked if they had agreed upon their verdict, the foreman handed to the clerk, and the clerk handed to the judge, a paper, which the judge thereupon read aloud, and then said to the jury: "Gentlemen, you say that you find the prisoner guilty as charged in the information, and that you recommend him to the mercy of the court; and so say you all;" to which the jury nodded assent; and the verdict so given was recorded, and the jury discharged. The paper which the jury handed in contained in writing, signed by all the jurors, the following: "We find the prisoner, John D. Wright, guilty of assault with intent to kill William Wagner, as charged in the information; also that the shooting done by Wright was done under great provocation, and we would recommend the prisoner to the mercy of the court." The court sentenced him to be imprisoned in the state prison for seven years.

Atkinson Bros. and A. E. Chadwick, for plaintiff in error.

A. R. Avery, Prosecuting Attorney, *A. J. Smith*, Attorney General, and *W. T. Mitchell*, for the people.

The court *held* that the written finding of the jury must con-

trol under the circumstances disclosed by this record as to what their real verdict was; that there being no such offense under our statutes as an assault with intent to kill, the statutory offense being an assault with intent to commit the crime of murder, this written verdict cannot be construed as a finding that defendant was guilty of anything more than an assault and battery; and that the sentence, therefore, was one not authorized by the verdict.

Judgment reversed, and prisoner discharged.

SMITH vs. STATE.

(52 Ga., 88.)

ASSAULT WITH INTENT TO MURDER: *Sufficiency of evidence.*

On an indictment for assault with intent to murder, where the evidence showed a quarrel, in which the prosecutor struck the respondent in the face, the respondent then going to the house and coming out with two guns, and that the prosecutor then advanced towards the respondent with threatening gestures, taunting him to shoot, when the respondent shot, and that the prosecutor was a much more powerful man than the prisoner, it was *held*, that if death had ensued it would not have been murder, and the charge was not sustained.

In assault with intent to murder, every ingredient of murder must be present, except death, and where if death had resulted, the offense would have been manslaughter and not murder, the charge is not made out.

TOM SMITH was placed on trial for the offense of assault with intent to murder, alleged to have been committed on the person of one Arthur Jackson, on the 10th of May, 1873.

The defendant pleaded not guilty. The evidence for the state made, in brief, the following case:

Sam. Hunter and Steve Cody were playing marbles in the road, and Arthur Jackson was seated on the fence looking on, when defendant came up. He said to Jackson that he wanted to bite his ears like he used to bite them. Jackson replied that he should do no such thing. Defendant said, "Damn you, I will bite them anyhow." At the same time he jumped on Jackson and endeavored to bite his ears. Jackson pushed him off. He then grabbed at Jackson, scratching his face, causing the blood to flow. Jackson said that if a man played with him, he did not

want him to tear the blood out, and to go off and let him alone. Defendant replied, "By G-d, may be you don't like it, and if you don't, you need not take it." Jackson told him to go off from him. He advanced on Jackson again, saying he would bite his ears some, and pulled him off the fence. Jackson caught him by the breeches and turned him over the fence backwards. He carried Jackson's hat over with him. Milton Gill, who was standing by, said, "Jackson, if you don't mind, you will break that nigger's neck." Jackson said to defendant that he did not intend to let him fall so hard, and asked him if he was hurt. He said he was not. Jackson asked him to hand his hat over. Defendant said, "Wait, damn you, let me hit you first." He then handed the hat over, contemporaneously hitting Jackson in the eye. He then got over the fence and caught Jackson around the neck, who said to him, "Smith, you ain't no man, go away; I could whip you with a hickory." He replied that it was a "G-d d--d lie, by G-d." Jackson said, "Smith, a man give me the damned lie in Covington this morning, and I hate for a man to keep on giving me the damned lie in cold blood." He replied that "it was a G-d d--d, h--ll fired lie, by G-d, and if you don't like it, you need not take it." Jackson slapped his face. He said, "Jackson, are you mad?" Jackson replied that he was not. He then said, "Stay here till I come back." He left and went home, which was about two hundred and fifty yards from the place where they were scuffling. Jackson moved away from the fence and sat down in the road. After the lapse of ten or fifteen minutes, he heard the defendant hollo, "Clear the way, you women and children, by G-d." He was about fifty yards from Jackson, and had two double barreled shot guns. Jackson jumped up and told him to shoot, that nobody was afraid. He placed the gun which he had in his right hand against the nearest paling, and took the other one from his shoulder. Jackson said, "Shoot ahead, here's your mule," and at the same time stepped to the side of and between the palings. The defendant fired. Jackson returned to the center of the road and asked him what he meant. He replied, "I mean to shoot you, G-d d--n you." Jackson said, "Shoot quick, for I am coming to you," at the same time advancing on him. When Jackson was within thirty yards of him a second shot was fired, the shot striking Jackson on the right side. Jackson told him to shoot again, as

he was coming at him. The defendant threw down the empty gun and took the other and half cocked it. Jackson was advancing on him so fast that he pulled the trigger, but the gun would not go off. He cocked it again, but by this time Jackson had reached him, and struck the muzzle of the gun. It went off and the shot lodged in his head. The last shot also struck his left arm. He seized the gun in his right hand and struck at the defendant's head. The blow missed his head, struck the ground, and broke the gun in pieces. Jackson had a switch in his hand at the commencement of the difficulty, about as large as his thumb. He threw it down in the road.

The evidence for the defense did not materially alter the case made by the state. It tended to show that Jackson was very violent in his conduct to defendant before the shooting, and that he commenced advancing upon the defendant as soon as he saw him with his gun, telling him to shoot, and that all three shots were fired under these circumstances. Also, that when Jackson struck at the defendant with the gun he did not miss him, but, on the contrary, cut his head very badly.

The jury returned a verdict of guilty. The defendant moved for a new trial, because the verdict was contrary to the law and the evidence. The motion was overruled, and defendant excepted.

H. D. Capens, by *J. J. Floyd*, for plaintiff in error.

T. B. Cabaniss, Solicitor General, by *Peeples* and *Howell*, for the state.

TRIPPE, J. It has been so often decided as to what the evidence must show, to sustain a conviction for the offense of an assault with intent to murder, that it is unnecessary to do more than merely to reiterate it here. Had death ensued from the assault, from the circumstances of the killing, the defendant would only have been guilty of manslaughter; he then cannot be guilty of an assault with intent to murder, when there is no killing. All the ingredients of murder, except the killing, enter into and are necessary to constitute the crime of assault with intent to murder. At least, there must be malice, express or implied, that would make the assailant a murderer, had he taken life in the assault. If there cannot be murder without malice, there cannot be an intent to murder unless the same element of

malice appears. *Meeks v. The State*, 51 Ga., 429, and *Jackson v. The State*, id., 402. As this case goes back for another trial, the testimony will not be discussed here, further than to say that the record shows that the defendant had stopped and put down his guns when the prosecutor started towards him, with threatening invitations to shoot; that he was coming; to shoot quick; that he was coming to him, etc., etc. The defendant seems to have been but a weakling compared to the prosecutor, who had already shown his complete power to do as he might please with defendant. The evidence for the defense certainly makes out a case that would not have been murder had the defendant killed the prosecutor, and it could scarcely have been worse under the prosecutor's own statement, if what he says about the first firing be stricken out. As to that firing, it does not appear that the defendant shot at the prosecutor, or in what direction he did fire. It is probable he did fire at him, but the prosecutor says "he stepped to the side of and behind the palings." This was before the firing. The defendant was fifty yards off; some, and most of the witnesses, made it a good deal farther. The prosecutor then sprang out, rushed towards the defendant with the threatening declarations, and with the effort to do great violence to defendant when he reached him. It was under these circumstances the other firing took place. But the matter will be passed on again by a jury, and no further comment on the testimony will be made.

Judgment reversed.

BARCUS vs. STATE.

(49 Miss., 17.)

ASSAULT WITH INTENT TO MURDER: *Intent.*

Where the evidence showed that the respondent shot at A. intending to kill him, but missed him and accidentally hit B., a by-stander, it was *held*, that he was not guilty of assault with intent to commit murder on B.

Intent may be inferred from the act, but there is no artificial rule of law which requires or allows a particular intent to be presumed from given facts, where the undisputed evidence shows that no such intent was in fact entertained.

In assault with intent to murder, there must be an intent to kill the person assaulted.

TARBELL, J. At the last March term of the circuit court of

Warren county, the plaintiff in error was indicted, tried and convicted on a charge of shooting at Sandy Mitchell with intent to kill. From the judgment against him the accused prosecuted a writ of error, and asks here a reversal of that judgment upon several grounds not essential to repeat or discuss. Upon the trial, the right of the city police to arrest vagrants, without warrant, was made a prominent point, and is again pressed in the argument in this court, but we do not think that question involved at present. There is a fatal error, however, in this case, and it is this: There is no evidence that the accused shot at Sandy Mitchell. The proof is, that he shot at Henry Creighton, and according to his own declarations subsequent to the shooting, intended to kill him. Upon this point there is no conflict in the evidence. It is positive and uncontradicted, that he shot at Henry Creighton, accidentally hitting Sandy Mitchell, an innocent by-stander. The verdict is wholly unsupported by the evidence. It is true, that the jury, in response to the instruction for the state have found, in substance, that the accused shot at Sandy Mitchell with the intent to kill and murder him; but the verdict must have been through some misapprehension of law or fact. There is no doubt of the rule, that a man shall be presumed to intend that which he does, or which is the natural and necessary consequence of his act; and that malice, in this class of cases, may be presumed from the character of the weapon used. If the evidence in the case at bar was limited to the mere fact of shooting and the striking of Mitchell as the result of the shot, or if the evidence as to the person intended to be killed was conflicting, we might accept the verdict as conclusive; but the record before us leaves no question or doubt. Indeed, it is conclusive that Creighton and not Mitchell was the person aimed at and designed to be hit. To sustain the indictment in this case, it was incumbent on the part of the state to prove that the accused shot at and intended to kill Mitchell, whereas the proof is that he shot at Creighton with the intent to kill him. The essential averments of the indictment are, therefore, not only not sustained, but absolutely negatived. It follows that the indictment should have charged the shooting to have been at Creighton, and the result is, the judgment must be reversed and the indictment quashed, but the accused cannot be set at liberty. He will be detained in custody to await a trial under another indictment, to

be drawn as herein indicated. 13 S. & M., 242; 11 id., 317; 24 Miss., 54; Code, § 2497.

Judgment reversed, and cause remanded, with a recommendation to the district attorney to quash this indictment, and instructions to the proper authorities to detain the accused, subject to the action of the circuit court of Warren county.

Judgment reversed.

STATE vs. UNDERWOOD.

(57 Mo., 40.)

HOMICIDE: *Change of venue — Discretion — Degrees of murder — Self defense — Defense of property — Presence of respondent during argument of interlocutory motion — Seclusion of jury.*

Under a statute regulating changes of venue, one section provides that no second change of venue shall be had. Another section provides that a change of venue shall be had when the judge has been of counsel in the cause. Where in a change of venue the cause was removed to a circuit where the judge had been of counsel in the cause, it was *held* that a second change of venue was properly had, notwithstanding the provision of the section first mentioned.

Whether or not a co-respondent, indicted as an accessory, shall be first tried so that his testimony may be had for the defense on the trial of the principal, is a matter in the discretion of the trial court, and the supreme court will not review the exercise of that discretion where there is no evidence that it has been abused.

On a trial for homicide it appeared that at the time of the killing, the deceased was engaged in moving a line fence between himself and respondent. It appeared also that the fence had been built by and belonged to deceased, but that it had been built on respondent's land: *Held*, that respondent had no right to resort to violence to prevent deceased removing the fence, and that evidence as to the respective rights of the parties to keep the fence where it was was irrelevant and inadmissible.

Where the jury finds the respondent guilty of murder in the first degree, under instructions properly defining murder in the first degree, *it seems* that respondent would not be prejudiced by an erroneous instruction as to murder in the second degree.

Where the evidence shows that respondent killed deceased with a gun loaded by powder and bullets, the law presumes the killing to be intentional, and that it is murder in the second degree, in the absence of proof to the contrary, and it devolves upon the defendant to show from the evidence in the cause, to the reasonable satisfaction of the jury, that he is guilty of a less crime, or that he acted in self-defense.

In cases of homicide, if circumstances of wilfulness and deliberation are not

proved, the law presumes the killing to be murder in the second degree only.

One who seeks and brings on a difficulty cannot shield himself under the plea of self-defense, however imminent the danger in which he finds himself in the progress of an affray.

It is not necessary that respondent should be present in court during the argument of a motion for a new trial, if he is present when it is finally determined.

After the jury had retired, two witnesses necessarily passed through the jury room to get down stairs, but without any communication with the jury: *Held*, no ground for setting aside the verdict.

The affidavits of jurors are receivable in support of their verdict to show that nothing improper occurred during their consultation.

WAGNER, J. This was an indictment for murder in the first degree, found in the Ralls county circuit court against the defendant and six others, for the killing of one Richard Menifee.

The defendant was charged as principal in the first degree, and the others were charged as being present, aiding, abetting and assisting in the murder.

Upon the application of the defendants, a change of venue was granted to the circuit court of Macon county, and when the case was called for trial, a new judge having in the meantime been elected, who had previously been of counsel for defendants, a suggestion of that fact being made, the case was sent to Marion county, in another judicial circuit, for trial.

When the case was called, the attorneys prosecuting for the state announced themselves ready for trial, and the defendant and Samuel Scobee, who was included in the indictment as a co-defendant, moved for a separate trial. Scobee asked that he might be first tried, and defendant demanded that Scobee should be first tried, alleging that he wanted the testimony of Scobee to be used on his trial. The circuit attorney then moved that the defendant be first tried, as he stood charged as principal in the first degree, and Scobee was only charged with aiding and abetting. The court sustained this motion, and ordered the prosecution to proceed against the defendant, and to this ruling exceptions were duly saved.

It seems that the difficulty between Menifee, the deceased, and the defendants in the indictment, had its origin in the removal of a fence which separated the farms of the respective parties. The true line was not accurately fixed, but enough was known to render it certain that the fence was placed upon the land of the

Underwoods, the defendants. Meniffee had built the fence and it belonged to him, and at the time the homicide was committed he, with his brother, was in the act of removing it and putting it upon his own land. To this defendants objected, as it would expose their crops. Defendant and Meniffee had had some difficulty the evening before, and on the morning of the murder, Meniffee brought a shot-gun with him when he went to his work in tearing down and rebuilding the fence.

The main witness for the prosecution was the brother of the deceased, who was assisting him at the time. He says that while they were staking off the line, he looked out and saw two men, defendant and Scobee, and when they saw witness and the deceased, defendant started towards them, and then stopped and made a motion to Scobee to go west; Scobee got on his horse and went in that direction, and defendant went south towards Stephen Underwood's (his father's) house. The work continued, and in a short time Stephen Underwood came, and he said to the deceased that the boys were not going to let him move that fence. Deceased then said there was a legal way to stop them from moving the fence, and the old man said he would see as soon as he could get the boys and their arms. Stephen Underwood then went towards his house. Witness and deceased then went to another portion of the fence and commenced tearing it down, when, in about half an hour after Stephen Underwood left, he returned, and upon looking up witness, told his brother that he saw Stephen Underwood, William Underwood, Strother Underwood, Wesley Underwood (defendant), Frank Underwood, Asa Underwood, and Samuel Scobee. They were about a quarter of mile off when he first saw them. Scobee and Strother Underwood were coming from the west until they got to his brother's fence, and then they came up the fence. Stephen and Frank Underwood were coming up the fence from the south; the other three were coming up about twenty steps from the fence. The old man ordered witness to stop tearing down the fence, but he kept on. They then had an altercation between themselves. Defendant Wesley Underwood started from the edge of some plowed ground opposite Richard Meniffee, the deceased, with his gun presented towards him, in a position to shoot; Richard then picked up his gun; both fired; the shots were so near together that witness could not tell which fired first. Richard was shot

and fell; he then raised himself up on his knees and shot again. The Underwoods then ran towards him and were shooting and beating him. Witness heard some three or four shots. Some had sticks, some guns and some pistols; saw some three or four blows, could not tell how many. The deceased, after he was shot down, was repeatedly struck with a gun, on his breast, neck and head, and died in a short time thereafter. The shots were mortal. There was no other eye witness on the part of the state, but there was corroborative evidence as to the number of shots, etc., by those who were working in the immediate neighborhood.

William Collins was a witness for the state, and he testified that he lived within less than a quarter of a mile of Stephen Underwood, and he explained the situation of his farm and the Underwood and Meniffee farms, and stated in his testimony that the Underwoods had joined on his fence without permission. To this testimony, as to Underwood's joining witness' fence without permission, defendant's counsel objected, and the court sustained the objection; but the evidence was given in a narrative form, and the remark was made before the witness could be stopped.

For the defense, Mrs. Amanda Scobee, wife of Samuel Scobee and sister of the defendant, stated that on the morning of the murder she started out to the field, and saw her husband and Strother Underwood riding in the direction of where Meniffee was tearing down the fence, and that she went on up to the fence and was within thirty or forty rods of where Meniffee and defendant fought; that when she got there all the defendants and Richard and John Meniffee were there; Richard and John were tearing down the fence. She then speaks about the difficulty that took place between John Meniffee and her father, and after that Richard Meniffee then said: "There is Wesley (defendant), and by God I will kill him, anyhow," and picked up his double barreled shot gun and fired at Wesley as he picked up his gun. Strother said, "For God's sake, Dick, don't shoot." Dick shot Wesley, and Wesley shot Dick. They fired two shots each; Dick was killed and Wesley was badly wounded, and pulled open his shirt and said he was killed.

The witness then testifies that she and her husband did what they could to administer to the comfort of the deceased while he lived, and in the continuation of her testimony she says that

Dick and Wesley each had a double barreled shot gun; that there were four shots fired in all, and that after the firing, Wesley and Dick came together and clenched and fell. John Meniffee then ran up and pulled Wesley off from Dick; Wesley picked up a gun and turned on John and struck him, and then turned on Dick and struck him several times with the gun. Franklin Underwood, another brother of the defendant, testified that he had been at home sick, and was in the house when Wesley, the defendant, came and got his gun, and said the Meniffees were pulling down the fence, and started off in that direction. Witness then put on his coat and followed after him; he saw the whole encounter, and gives essentially the same version of it that Mrs. Scobee does in her testimony. Some other evidence was introduced, which was unimportant. The defense then offered to prove that the Underwoods had joined their fence to Meniffee's with the latter's permission. This evidence was objected to by the state, and the objection sustained.

For the state the court gave twelve instructions; the sixth, seventh and eighth are the ones objected to in this court.

The sixth instruction told the jury that if the defendant killed Meniffee with a gun loaded with powder and bullets, the law presumed the killing to have been intentional, and it was murder in the second degree in the absence of proof to the contrary, and that it devolved upon the defendant to show, from the evidence in the cause, to the reasonable satisfaction of the jury, that he was guilty of a less crime, or acted in self defense.

By the seventh declaration the jury are instructed that if they believe, from the evidence, that Richard Meniffee was engaged in pulling down his fence, and that the defendant came to where said Meniffee was at work, armed with a loaded gun, for the purpose of compelling said Meniffee to desist from pulling down the fence by force, and approached said Meniffee in such a manner as to give Meniffee reasonable cause to apprehend a design on the part of defendant to kill him, or to do him some great bodily harm, unless he desisted from pulling down the fence, and there was reasonable cause to apprehend immediate danger of such design being accomplished, then the killing of said Meniffee by defendant was not justifiable homicide.

The eighth instruction tells the jury that if they find, from the evidence, that defendant and deceased had a difficulty which re-

sulted in the death of the deceased, and that defendant commenced the difficulty, or brought it on by any wilful and unlawful act of his, committed at the time, or that he voluntarily and of his own free will and inclination entered into the difficulty, then there is no self defense in the cause, and they should not acquit on that ground; and in such case it made no difference how imminent the peril might have been, in which the defendant was placed during the difficulty. There is a second instruction numbered six, which told the jury that if they should find, from the evidence, that Richard Menifee was engaged in pulling down his fence, and that Wesley Underwood came to where said Menifee was at work, armed with a loaded gun, for the purpose of compelling said Menifee to desist from pulling down the fence by force, and approached said Menifee with his gun held in a position to shoot, then the killing of said Menifee by said Wesley Underwood was not justifiable or excusable homicide.

On the part of the defense, the court instructed the jury: First, that defendant had a right to carry his double-barreled shot-gun, and that if they found, from the evidence, that whilst so carrying it, he made no threat, menace, or demonstration to shoot Richard Menifee, and if they should further find, that said Menifee, without being threatened by defendant, or menaced by him in any hostile manner whatever, picked up his gun and declared that he would kill defendant, and then and there presented his gun, loaded with powder and bullets or shot, at defendant, in a shooting position, then in such case, defendant had a right to shoot said Menifee in self defense, and even to take his life in order to save his own; secondly, that if the jury believed, from the evidence, that defendant, at the time he shot and killed Richard Menifee, had reasonable cause to apprehend a design on the part of said Richard Menifee, to commit a felony upon him, or to do him some great personal injury, and that there was reasonable cause to apprehend immediate danger of such design being accomplished, then, in such case, defendant had a right in defense of his own person to shoot and even to kill the said Richard Menifee, unless the defendant sought and provoked the difficulty; thirdly, that defendant had a right to go, either alone or with others, to the point where Richard Menifee and his brother were tearing down the fence, for the purpose of remonstrating with them, in a peaceable manner, to dissuade them from pulling down the fence,

and if the jury believed, from the evidence, that whilst defendant or others were so engaged, in a peaceable manner, remonstrating against the tearing away or removal of said fence, Richard Menifee picked up his gun, loaded with powder and bullets or shot, declaring that he would kill defendant, and then and there presented his gun at defendant in a hostile manner, then defendant had a right, in the necessary defense of his own person, to shoot and kill the said Richard Menifee, and the jury ought to find a verdict of "not guilty."

The jury rendered a verdict of murder in the first degree, and it is to reverse the judgment entered therein that this appeal is presented.

There is no merit in the point raised, that the second change of venue was improperly granted, and that the circuit court of Marion county had no jurisdiction.

Aside from the fact that no exceptions were taken to the order, the statute settles the question conclusively. The act in reference to criminal practice (2 Wagn. Stat., p. 1097, §15) provides that when any indictment or criminal prosecution shall be pending in any circuit court, the same shall be removed by the order of such court, or the judge thereof, to the circuit court of some county in a different circuit, in either of the following cases: First, when the judge of the court in which such case is pending, is near of kin to the defendant, by blood or marriage; or, second, when the offense charged is alleged to have been committed against the person or property of such judge, or some person near of kin to him; or, third, when the judge is in anywise interested or prejudiced, or shall have been counsel in the cause. The 20th section of the same act declares that whenever it shall be within the knowledge of a court or judge, that facts exist which would entitle a defendant to the removal of any criminal cause, on his application, such court or judge may make an order for such removal, without any application by the party for that purpose. And although the 27th section says, that in no case shall a second removal of any cause be allowed, yet this court has decided that a second change of same may be granted where the judge has been counsel in the cause, notwithstanding the above provision. *State v. Gates*, 20 Mo., 400. It is true that in this last case, the judge who awarded the change of venue had been the prosecuting attorney, but that makes no difference, as

the 15th section applies justly and properly to every judge, whether he has been counsel for either the plaintiff or defendant.

It is next insisted, that Scobee should have been first tried, in order that the defendant might have had his testimony upon the trial. But upon this point there is nothing to show that the court exercised its discretion unsoundly. It is the practice in criminal cases, where a codefendant has been included in the indictment by mistake, or facts and circumstances are shown, by which it is apparent that no verdict of guilty can be obtained against him, to allow him to be first tried, so that he may be restored to his rights as a witness. The exercise of this power is usually called forth where there is a joint trial. Where, in the case of a joint trial, the evidence in behalf of the prosecution is all in, and there is no testimony implicating one of the defendants, it is then the duty of the court to permit the verdict to be immediately taken, acquitting this one, and then he will be a competent witness for the rest. If there is some evidence, though slight, against the defendant whose testimony is thus desired by the others, the court may, in its discretion, submit his case to the jury at this stage of the trial; and if he is acquitted, he will be a competent witness. 1 Bish. Crim. Proc., § 962; *State v. Roberts*, 15 Mo., 28; *Fitzgerald v. The State*, 14 id., 413.

In this case the defendants were severed in the trial. No facts were brought to the attention of the court, which made it imperatively necessary to comply with defendant or Scobee's demand, and the court simply exercised a discretion which we will not revise. Of course a person indicated as an accessory, or principal in the second degree, may be put upon his trial before the principal in the first degree is tried or convicted, but that question has nothing to do with the ruling of the court here.

The court very properly excluded the testimony tending to show that defendant joined his fence with that of the deceased by permission. No such issue was raised in the case, and if the permission had been granted, it would not have justified or excused the offense.

The defendant had the right to remonstrate with the deceased against his act, whether the fence was joined by permission or not, but he had no right to resort to violence, in order to prevent its being torn down. Upon this point, the court gave an instruction presenting the question in favor of the defendant, in

the strongest light. The evidence of Collier, about the defendant joining to his fence without leave, was not called out by the prosecution. The witness was giving his testimony in the narrative form, and used the remark before any objection was made. As soon as it was objected to, the court promptly ruled it out. It could not be withdrawn, for it was already uttered, and if the defendant considered that it was in anywise injurious to him, his counsel should have procured an instruction telling the jury to disregard it. The 6th instruction is the one most strongly objected to, and that, as before stated, told the jury that if the defendant killed Menifee with a gun loaded with powder and bullets, the law presumed the killing to have been intentional, and it was murder in the second degree, in the absence of proof to the contrary, and it devolved upon the defendant to show from the evidence in the cause, to the reasonable satisfaction of the jury, that he was guilty of a less crime, or acted in self-defense. It is difficult to perceive how this instruction could have injured the defendant, as the jury did not find him guilty of murder in the second degree, but they convicted him of a different and higher grade of offense, namely, murder in the first degree upon an instruction which had previously been given, requiring them, before they could convict of that degree, to find that the killing was wilful, deliberate and premeditated. But the instruction is unobjectionable. To constitute murder in the first degree, it is necessary that circumstances of wilfulness and deliberation shall be proven. This proof, however, need not be express or positive. It may be deduced from all the facts attending the killing, and if the jury can reasonably and satisfactorily infer from all the evidence, the existence of the intention to kill, and the malice of heart with which it was done, it will be sufficient. But if circumstances of malice and premeditation are not proved, the law presumes the killing to be murder in the second degree only. This question was fully discussed in a quite recent case in this court (*State v. Holmes*, 54 Mo., 153), and the settled doctrines in this state reviewed and reiterated.

The 8th instruction is based on the well settled doctrine that a party who seeks and brings on a difficulty cannot avail himself of the right of self-defense, in order to shield himself from the consequences of killing his adversary, however imminent the danger in which he may have found himself in the progress of the

affray. *State v. Starr*, 38 Mo., 270; *State v. Linney*, 52 id., 40.

The 9th instruction is predicated upon the hypothesis that there was a mutual and voluntary combat. If that were so, defendant could not rely on self-defense. For, where parties by mutual understanding, engage in a conflict, and death ensue to either, the slayer will be guilty of murder.

The second instruction given for the defendant, being the first adverted to in a prior part of this opinion, gave the accused the full benefit of all he could claim in regard to the right of self-defense. The third fully justified him if he acted on appearances, grounded on reasonable cause of apprehended danger, and was surely sufficiently favorable. And the fourth declares, that if, whilst defendant was remonstrating with Menifee against tearing down the fence, the latter picked up his gun, threatening to kill defendant, and presented the same at defendant in a hostile manner, then the defendant had the right, in the necessary defense of his person, to shoot and kill the deceased. When the instructions are all taken together, they lay down the law with such manifest fairness, and withal are so just to the defendant, that it is impossible to find any real or tangible ground for complaint.

It is further contended that the defendant was not present in court during the whole progress of the trial, and therefore the judgment is erroneous. Upon this point the record shows that whilst the prisoner was in jail, the attention of the counsel in the cause was called by the court to the causes assigned for a new trial, and thereupon it was suggested by the prosecuting attorney that the prisoner should be brought into court; the court then announced that it would not be necessary, as no action would be taken on the motion at that time; but that the court, with a view of understanding the legal question, desired a reference to certain authorities relied on, and also the view of counsel thereon. Authorities were read, and the counsel, both for the state and for the defendant, stated their views of the legal question involved in the absence of the defendant. The further hearing of the motion then passed over until another day, at which time the defendant was present, whereupon the motion was taken up, and after counsel on both sides had read the authorities relied on by them respectively, and submitted their views, the court

overruled the motion. Every person indicted for a felony must be present during the trial (2 Wagn. Stat., p. 1103, § 15); but here no step was taken in the trial during the defendant's absence. After the trial was over, the court requested the attorneys to furnish it with any authorities they might have, bearing on a legal question involved in the motion for a new trial, and also to state their views concerning the same; but no farther action was taken; no ruling was made, and nothing transpired having any reference to the progress of the trial. When the time arrived for the court to proceed with the determination of the motion, the defendant was present, the final argument was then made, and the court acted in his presence. This point must be ruled against the defendant.

One more objection only remains to be noticed. It appears that before the case was given to the jury, and whilst they were still in the court room, two witnesses from Ralls county who were present on the part of the state, ascended to the cupola of the court house for the purpose of obtaining a view of the town. The stairs by which they went up led from a door in one corner of the county clerk's office. Whilst they were on the court house, the jury were conducted by the sheriff into the county clerk's office, the room set apart for them, for consultation. The men, not knowing that the jury were there, descended in the same way that they had gone up, and then opened the door and passed immediately out of the room. The jury were in another corner of the room, and no word of communication was had between the jury and the witnesses. These facts are abundantly established by the affidavits of the two men themselves, and by the sheriff and his deputy, and by several of the jurymen. Whilst I agree that any tampering with a jury, however slight, may be sufficient to set aside their verdict, the case here shows most conclusively that there was neither tampering, misbehavior, nor any improper conduct whatever.

These facts are perfectly evident without regard to the affidavits of the jurors. But I do not think that the court erred in receiving the affidavits of the jurors. The rule is perfectly settled, that jurors speak through their verdict, and they cannot be allowed to violate the secrets of the jury room, and tell of any partiality or misconduct that transpired there, nor speak of the motives which induced or operated to produce the verdict. But

they may testify in support of their verdict, that no disturbing influence was brought to bear upon them, and that they were not interfered or tampered with. This question was elaborately considered, and all the leading authorities collated and reviewed in *Woodward v. Leavitt*, 107 Mass., 453, and the doctrine was declared to be as above stated.

I think the court did not exercise its discretion unsoundly in refusing to sustain the motion in this respect. Upon an examination of the whole record, I have discovered no material error.

Judgment affirmed.

The other judges concur.

JONES vs. COMMONWEALTH.

(75 Pa. St., 403.)

HOMICIDE: *Distinction between murder in the first and murder in the second degrees — Deliberation and premeditation.*

The respondent pleaded guilty to an indictment for murder. In accordance with the statute, the trial court heard evidence of the circumstances of the case, and adjudged the respondent guilty of murder in the first degree. A request having been made for special findings, and for filing the testimony on which the findings were based, the record was removed to the supreme court by a writ of error, and the judgment of the trial court reversed, and the respondent adjudged guilty of murder in the second degree.

The respondent had taken to hard drinking on account of the continued adulteries of his wife. He had attempted suicide by taking laudanum, and although his life was saved, continued up to the time of the killing in a constant state of nervous excitement, drinking, and keeping laudanum about him. On the day of the homicide he was in a state of high nervous excitement, and acted like a crazy man. On the evening of the killing, he went to the house of the deceased, his wife's mother, between nine and ten o'clock. He said he had come to settle the fuss. His mother-in-law told him to go. He stepped back. She picked up a stool, and said she would level him with it if he did not go. He said, "I'll level you now," and immediately pulled out a pistol and shot her. Previous to this he had been on good terms with her. *Held*, murder in the second degree, there not being sufficient evidence of premeditation and deliberation.

AGNEW, C. J. In this case, if we confine our attention to the weapon, its previous preparation, the threat proved by Mr. Crooks, the time for deliberation, and the circumstances of the killing of Mrs. Hughes by the prisoner, we might conclude that

his crime was murder in the first degree. In this respect the learned judge of the oyer and terminer had sufficient evidence to justify his finding of the degree. But ample time for reflection may exist, and a prisoner may seem to act in his right mind, and from a conscious purpose; and yet causes may affect his intellect, preventing reflection, and hurrying onward his unhinged mind to rash and inconsiderate resolutions, incompatible with the deliberation and premeditation defining murder in the first degree. When the evidence convinces us of the inability of the prisoner to think, reflect and weigh the nature of his act, we must hesitate before we pronounce upon the degree of his offense. That reasonable doubt which intervenes to prevent a fair and honest mind from being satisfied that a deliberate and premeditated purpose to take life existed, should throw its weight in the scale to forbid the sentence of death. Intoxication is no excuse for crime; yet when it so clouds the intellect as to deprive it of the power to think and weigh the nature of the act committed, it may prevent a conviction of murder in the first degree. The intent to take life, with a full and conscious knowledge of the purpose to do so, is the distinguishing criterion of murder in the first degree; and this consciousness of the purpose of the heart is defined by the words deliberately and premeditatedly. Much has been said upon the meaning of these words, some of which may mislead, if we do not consider well the cases in which it has been uttered. In the *Commonwealth v. O'Hara*, tried in 1797, Chief Justice McKEAN said: "What is the meaning of the words deliberately and premeditatedly? The first implies some degree of reflection. The party must have time to frame the design. The time was very short; it cannot be said to be done coolly. The legislature must have put a different construction on the words deliberately and premeditatedly. If he had time to think, then he had time to think he would kill. If you are of opinion he did it deliberately, with intention to kill, it is murder in the first degree. If he had time to think, and did intend to kill, for a minute as well as an hour, or a day, it is sufficient." The correctness of this charge to the jury will not be doubted, if we examine the circumstances, and yet this is essential to understand it properly. O'Hara was a journeyman shoemaker, sitting on his bench at work with Haskins and others. Aitkins, the deceased, his friend, came up stairs and said to him: "I have

been talking about you below, this hour." "Yes," said Haskins, "about the five sheep you stole." Thereupon O'Hara *immediately* left his work upon the bench, took up a shoemaker's knife by his side, went up to Aitkins, and stabbed him in the belly. The act was not thoughtless, for the prisoner had time to lay down his work, take up the knife, rise and walk up to his friend, and to strike him in a vital part with an instrument of death. Upon every principle of human action, we must conclude, under these circumstances, that O'Hara intended to take Aitkins's life, otherwise the thoughts of men never can be determined from clear and distinct acts evidencing the purpose of the mind. There was irritation, it is true, heightened by the previously existing story about the sheep; but it was without any just cause or provocation to take life, and, therefore, evidenced a heart malignant, and ready to execute vengeance even upon a friend, in a moment of wicked passion. In such a case, a moment was sufficient to form and deliberate upon the purpose to take life, and premeditate the means of executing it. But these words of the chief justice are sometimes wrested from their application and applied to cases where reason has been torn up by the roots, and judgment jostled from her throne.

Another case, often quoted and misapplied, is that of Richard Smith, tried before President Rush, in 1816. Smith had become intimate with the wife of Captain Carson, and had a difficulty with him in his own house. He returned with Mrs. Carson, and went with her up into the parlor. Carson came up unarmed, and ordered him to leave. Smith had armed himself, and held one hand under his surtout, and the other in his breast. Carson told Smith that he had come to take peaceable possession of his own house, and the latter must go. Smith said to Mrs. Carson, "Ann, shall I go?" She replied, "No." Smith moved into the corner of the room, Carson following him, and telling him he must go, at the same time letting his arms fall by his side, and saying he had no weapon. Upon this, Smith drew a pistol from under his surtout and shot Carson through the head, threw down his pistol and ran down stairs. In this state of facts, Judge Rush, charging upon the subject of deliberation, said: "The truth is, in the nature of the thing, no time is fixed by law, or can be fixed, for the deliberation required to constitute the crime of murder." Speaking, then, of premeditation, he

says: "It is equally true, both in fact and from experience, that no time is too short for a wicked man to frame in his mind the scheme of murder, and to contrive the means of accomplishing it." We cannot doubt the correctness of these remarks in the case in which they were made, but cases often arise where this readiness of intent to take life, when imputed, may do great injustice. Hence it was said in *Drum's Case*, 8 P. F. Smith, 16: "This expression (of Judge Rush) must be qualified, lest it mislead. It is true that such is the swiftness of human thought, no time is so short in which a wicked man may not form a design to kill, and frame the means of executing his purpose; yet this suddenness is opposed to premeditation, and a jury must be well convinced upon the evidence that there was time to deliberate and premeditate. The law regards, and the jury must find the actual intent, that is to say, the fully formed purpose to kill, with so much time for deliberation and premeditation, as to convince them that this purpose is not the immediate offspring of rashness and impetuous temper, and that the mind has become fully conscious of its own design. If there be time to frame in the mind fully and consciously the intention to kill, and to select the weapon or means of death, and to think and know before hand, though the time be short, the use to be made of it, then there is time to deliberate and premeditate." This was said in the case of a sudden affray, where the circumstances made it a serious question whether the act was premeditated, or was the result of sudden and rash resentment.

Thus we perceive, that at the bottom of all that has been said on the subject of murder in the first degree, is the frame of mind in which the deadly blow is given; that state of mind which enables the prisoner either to know and be fully conscious of his own purpose and act, or not to know. Why is insanity a defense to homicide? Because it is a condition of the mind which renders it incapable of reasoning and judging correctly of its own impulses and of determining whether the impulse should be followed or resisted. Intelligence is not the only criterion, for it often exists in the madman in a high degree, making him shrewd, watchful and capable of determining his purpose, and selecting the means of its accomplishment. Want of intelligence, therefore, is not the only defect to moderate the degree of offense; but with intelligence there may be an absence of power to deter-

mine properly the true nature and character of the act, its effect upon the subject, and the true responsibility of the actor; a power necessary to control the impulses of the mind, and prevent the execution of the thought which possesses it. In other words, it is the absence of that self-determining power, which in a sane mind renders it conscious of the real nature of its own purposes, and capable of resisting wrong impulses. Where this self-governing power is wanting, whether it is caused by insanity, gross intoxication, or other controlling influences, it cannot be said truthfully that the mind is fully conscious of its own purposes, and deliberates or premeditates in the sense of the act describing murder in the first degree. We must, however, distinguish this defective frame of mind from that wickedness of heart which drives the murderer on to the commission of his crime, reckless of consequences. Evil passions do often seem to tear up reason by the root, and urge on to murder with heedless rage. But they are the outpourings of a wicked nature, not of an unsound or disabled mind. It becomes necessary, therefore, to inquire, upon the evidence in this case, whether the prisoner was really able to deliberate and premeditate the homicide.

William S. Jones had been upon bad terms with his wife. She had become too intimate with another Jones called Charley. William S. Jones, failing to break off the association, got to drinking hard, and finally, after another quarrel with his wife on the 10th of June, 1871, attempted suicide by taking a large quantity of laudanum. Dr. Davis found him lying on a lounge partly insensible, eyes nearly closed, pupils contracted, and face discolored by congestion. Energetic remedies were used, and he was so far restored as to be out of danger; but the effects of the laudanum remained. From this time until the night of the 19th of June, when he took the life of Mrs. Hughes, his mother-in-law, he was in a constant state of nervous excitement, continued drinking, and had bottles of laudanum about his person. Many witnesses describe him as without sense, constantly talking nonsense, wild in appearance, and incoherent in speech. Some say he acted like a man drinking hard, was intoxicated, and once fell from a horse. Others described him as looking crazy, talking to himself, his hands going, his head thrown back, walking to and fro, throwing his head about, swinging his arms, and wild, nervous and excited. He would jump upon a chair and begin to

preach, and run off upon Charley Jones and his wife; said he was going to build a tavern on the mountain, and a church beside it; claimed all the property about, and was evidently much out of the way. These appearances were particularly noticed on the 19th day of June, the day of the homicide. He was then on very bad terms with his wife, yet seeking her and remonstrating with her, and on the afternoon of that day, he had beaten and abused her, chasing her down stairs and into the street, and there striking and kicking her, until separated by others. He continued in this condition down into the night of the 19th, when he came to Mrs. Hughes's house, between nine and ten o'clock. Stepping inside of the door, he asked Mrs. Hughes if the fuss was settled; said he had come down to settle it. She rose and told him to go away; told Lizzie to fetch the poker; said she would strike him if he did not go away. He stepped back. She picked up a stool, and told him if he did not go away, she would level him with it. He said, "I'll level you, now;" pulled out a pistol, stepped forward and shot her. Mrs. Hughes twice exclaimed, "I am shot," and went back into the kitchen, while Jones was seized by the persons present, and the pistol wrested from his hand. Between him and Mrs. Hughes there had been a state of good feeling, before he took the laudanum, and she attended him upon the day when he was under its influence. He spoke of her as his best friend. His conduct towards his wife, her daughter, had led Mrs. Hughes to resent it, and some feeling had arisen on the part of Jones, but after his arrest, he said he took the pistol to kill his wife, and the old woman had got it.

Looking, then, at the state of Jones' mind, from the 10th until the 19th of June, and down to the very moment he fired the pistol, and also at the suddenness of his quarrel with Mrs. Hughes; her call for the poker, and lifting the stool, it seems to us a matter of grave doubt whether his frame of mind was such that he was capable either of deliberation or premeditation. It appears to have been rather the sudden impulse of a disordered brain, weakened by potations of laudanum and spirits, and of a disordered mind, led away from reason and judgment by dwelling upon the conduct of his wife, influenced by his continued state of excitement. It presents a case of the preparation of a weapon, and an undefined purpose of violence to some one, where the time for reflection was ample; but where the frame of mind

was wanting, which would enable the prisoner to be fully conscious of his purpose, or to resolve to take the life of the deceased with deliberation and premeditation. Yet it was clearly murder, done without sufficient provocation, and without necessity, and in a frame of mind evincing recklessness and that common law malice, which distinguishes murder from manslaughter. There was error, therefore, in ascertaining the degree, and sentencing to death.

The judgment of the court of oyer and terminer of Luzerne county is reversed, and this court proceeding now to determine, upon the same evidence, the degree of the crime whereof the said William S. Jones is convicted by his own confession, now finds and declares that the crime of the said William S. Jones is murder in the second degree, and gives judgment accordingly, and forasmuch as the said William S. Jones is confined in the public jail of Luzerne county, distant herefrom, it is further ordered that the record, together with this finding and judgment be remitted to the said court of oyer and terminer of Luzerne county, with a direction to the judges thereof to proceed to pronounce sentence upon the said William S. Jones, as for murder in the second degree, according to law, and for such term of imprisonment at labor, as they, the said judges, shall adjudge to be a fit and proper punishment for his said offense.

McCUE vs. COMMONWEALTH.

(78 Pa. St., 185.)

HOMICIDE: *Evidence to show motive — Degree of murder — Practice.*

On a trial for felonious homicide, any evidence tending to show that the respondent was jealous of the deceased is admissible as tending to show a motive.

On a trial for felonious homicide, no presumption arises from the killing, of an offense higher than murder in the second degree.

The facts in this case held sufficient to sustain a verdict of guilty of murder in the first degree.

Where the record does not show affirmatively that before sentence was pronounced the respondent was asked if he had anything to say why sentence should not be passed upon him, sentence will be reversed and the prisoner remanded to be sentenced afresh, but the verdict is not affected.

AGNEW, C. J. We think the assignments of error in this case fail to show any ground for reversal, except of the sentence of

the court of oyer and terminer. It was certainly competent to show, that the prisoner and the deceased had visited the same woman, and to follow this by evidence, that immediately after the homicide, the prisoner referred to the fact that he warned the deceased to let her alone, that she would be a curse to any one, and now his words had come to pass. Jealousy is among the strongest of the human passions, and it certainly was for the jury to determine, in the absence of any other assignable motive, whether it was the cause of the prisoner's act. The deceased and the prisoner had been apparently upon good terms, and lived together as single men. The witness, Amelia Wertman, testified that she was engaged to the deceased, and that the prisoner had visited her, and proposed to her to run away. If nothing had been secretly rankling in his heart, the shooting under the circumstances stated was singular and scarcely to be accounted for. The evidence of intoxication at the time of the shooting is very slight, and the degree of intoxication must have been very little. Afterwards he appears to have been a good deal more so, though not excessively drunk.

There was no evidence that the deceased had used threatening language or acts towards the prisoner. Hence the answer of the count to the fifth point was correct. The facts were referred to the jury. The only material question is, whether the evidence in the case contained the elements, or "ingredients" of murder in the first degree. It is certainly true, that the commonwealth must establish the existence of these elements, otherwise no presumption arises from the killing, of an offense higher than murder in the second degree. But if the evidence may reasonably admit of the conclusion, that the murder was wilful, deliberate and premeditated, it is for the jury to pronounce upon the degree of the crime, and a court of error will not reverse. In giving an interpretation to the act of February, 1870, we have said, if there have appeared in the testimony the ingredients to constitute murder in the first degree, our power ceases. We do not sit here to hear the case as upon a motion for a new trial, to determine where the weight of evidence lies, but "to determine whether the ingredients necessary to constitute murder in the first degree shall have been proved to exist." These being proved, the jury must determine the guilt or innocence of the prisoner. *Grant v. Commonwealth*, 21 P. F. Smith, 495.

This leads us to inquire into the circumstances of the killing. But one witness, Charles McCarty, was present. His account of the affair is concise and clear. On Sunday, October 25, 1874, McCarty was with the prisoner, who invited him to come into the house where he and the deceased lived. On going in, Dieter, the deceased, was lying in a bunk, apparently asleep. McCue, the prisoner, and McCarty took a seat by the window and took a drink of wine. McCue gave McCarty something to apply to his sore eyes, and while he was applying it, McCue was hunting for some money in his pockets, took off his vest, and laid a pistol on the window sill. McCarty said, "Barney, do you carry a pistol?" He said he did; it stood him in hand to, and he would use it probably before I thought. Dieter jumped up and said, "You are always talking of putting a bullet into somebody. If you think you can put one into me, come out and try it." He then made for the door, and Dieter ran against him outside of the door, throwing him upon his hands and knees. While they were going out, McCue grabbed the pistol from the window and followed. The witness ran across the street, and McCue followed Dieter closely, and when within four feet of him fired, the ball entering Dieter's right side, in front, between the seventh and eighth ribs. Dieter said, "Barney, you have put one of them into me;" and approached McCue. McCue raised the pistol, and Dieter knocked it out of his hand, closed with McCue, threw him down, and choked him until McCue gave up.

The pistol was picked up and found cocked. One load was discharged, two loads remained in it, and the fourth chamber seemed not to have been charged. These are the important facts bearing upon the shooting. The act was clearly unprovoked and needless. The deceased was unarmed, and had made no threats or demonstrations against McCue. If what he said when he jumped up and ran out may be construed as idle bravado, it was neither justification nor excuse for the shooting. The pistol was loaded with three charges; it was within four feet, or six, as another witness stated, of Dieter's front side, and was discharged right at him, the ball penetrating the liver, a vital organ; and the prisoner raised it again to discharge it. What then must we say of an act so plainly directed at the life of another, so unprovoked and so barbarous, done with a deadly weapon, under no circumstances of rage or passion, produced by any reasonable

cause of provocation. Clearly, there was sufficient time to think, deliberate and premeditate the act; as clearly the act was wilful and intentional, and the instrument used a deadly one, aimed a vital part, where death was the probable and natural consequence of the act. What other intention, than an intention to kill, could be rationally inferred from the whole conduct of the prisoner? The motive may be obscure, indeed, may not be fathomed; but the act was there, plainly and fully obvious to the senses, and the effect of it clearly open to the prisoner's own mind. The ingredients of the crime of murder in the first degree were all there, however inscrutable may be the causes which moved the prisoner to commit the deed. When all the elements of the crime are present, and when there can be but one rational inference from the act itself, retribution cannot be avoided, because the motive lies hidden and unrevealed in the heart of him only who could disclose it.

It is true the time was short and the bullet swift, and God alone knows the motive; but the time was not too short, or the messenger of death too speedy, to take from the prisoner a consciousness of the true nature of his act. Of this, therefore, the jury must judge. They had ground for their verdict and their conclusion, that the prisoner intended to kill, and wilfully, and with deliberation and premeditation shot Dieter, was not irrational or plainly unfounded. The circumstances indicated "a wicked and depraved disposition, a heart fatally bent on mischief." The act was not more sudden than that of O'Hara, who killed Aitkins, and had less provocation than his. *Commonwealth v. O'Hara*, App. to 7 Smith's Laws, 694. Without adopting all the language of Chief Justice MCKEAN in that case, I may use that of Judge STRONG in *Catheart v. The Commonwealth*, 1 Wright, 112: "If the killing was not accidental, then malice and a design to kill were to be presumed from the use of a deadly weapon; for the law adopts the common rational belief that a man intends the usual, immediate and natural consequences of his voluntary act. Human reason will not tolerate the denial that a man who intentionally, not accidentally, fires a musket ball through the body of his wife, and thus inflicts a mortal wound, has a heart fatally bent on mischief, and intends to kill." We are of opinion, therefore, that the elements of the crime found by the jury existed in the evidence, and so far there was no error.

But there is one error for which the sentence of the court must be reversed. It does not appear from the record that the prisoner was asked before sentence, why sentence of death should not be pronounced upon him. This is a fatal error, and affects the merits of the case. It is necessary to ask the prisoner this, that he may have an opportunity, before the penalty of death be visited upon him, to plead in bar of the sentence any matter sufficient to prevent its execution. He may have found out some good reason why the trial was not legal, or he may plead a pardon, or supervening insanity. The question and the answer that he hath nothing to say other than that which he hath before said, or this in substance, must appear in the record before the sentence can be pronounced. *Prine v. The Commonwealth*, 6 Harris, 104; *Dougherty v. Commonwealth*, 19 P. F. Smith, 291. In this case the question may have been asked in fact, but it does not appear in the record, and as it is a matter of substance, we must treat it as not having been done. In all high felonies, and especially in cases of murder, the presiding judge should see that the record is made up properly, before the term is over.

The sentence will be reversed, in order that the case may be sent back, and an opportunity afforded to the prisoner to plead in bar of it, but this error will not reverse the trial and conviction. *Jewell v. Commonwealth*, 10 Harris, 94, 102.

The sentence of the court of oyer and terminer in this case is reversed, and it is ordered that the record be remitted to said court, with an order of *procedendo* to proceed and sentence the prisoner afresh, in due order and process of law.

BERRY vs. COMMONWEALTH.

(10 Bush, Ky., 15.)

HOMICIDE: *Confessions — Erroneous charge — Dangerous weapons — Self-defense.*

A witness called to prove confession made by the respondent in a certain conversation, who testifies that "he could not remember all the conversations that took place; a great many things were said in the conversation that he did not remember," will not be allowed to testify to what he does remember.

A confession cannot be proved by a witness who does not remember the substance of all that was said in the same conversation.

What is a dangerous weapon is a question of fact and not of law.

A charge which assumes facts as proven is erroneous.

It seems that if respondent agreed to fight and did fight the deceased, and while fighting, something occurred to create a reasonable belief in the respondent that he was then in danger of death or great bodily harm from deceased, and if respondent then on account of such fear killed deceased with a knife, it will be homicide in self-defense, and excusable.

PETERS, J. Appellant and Joseph Sampson, between whom angry words had passed, by mutual consent, engaged in a personal conflict, in which Sampson was stabbed and killed. Appellant was indicted for homicide, found guilty by a jury, and the court below, after overruling his motion for a new trial, pronounced judgment of death against him, and, for a reversal of that judgment, this appeal is prosecuted.

Thomas Wilson was introduced as a witness on the trial by the attorney for the commonwealth to prove confessions made by appellant in relation to the homicide, in a conversation with one Henry Martin, in the hearing of Wilson, while he was guarding appellant, prior to his examination before the court for inquiry.

On being interrogated by the attorney for appellant, Wilson stated that "he could not remember all the conversation that took place; a great many things were said in the conversation that he did not remember."

The attorney for the commonwealth then asked him "to state what he did remember that Berry said." To that appellant's attorney objected; but the court overruled his objection, and permitted Wilson to answer the question; to which ruling of the court, appellant by his attorney at the time excepted; and whether or not the court erred to the prejudice of appellant, in permitting the question to be answered by Wilson, will be first considered and disposed of.

The rule is well settled, that if the prosecutor attempts to avail himself of the confessions of the prisoner, he must take all that he said at the time on the subject. Greenleaf says, "In the proof of confessions, as in the case of admissions in civil actions, the whole of what the prisoner said on the subject at the time of making the confession should be taken together." This rule is the dictate of reason as well as of humanity. The prisoner is supposed to have stated a proposition respecting his own connection with the crime; but it is not reasonable to assume that

the entire proposition with all its limitations was contained in one sentence, or in any particular number of sentences, excluding all other parts of the conversation.

As in other cases, the meaning and intent of the parties are collected from the whole writing taken together, and all the instruments executed at one time by the parties and relating to the same matter are equally resorted to for that purpose. So here, if one part of the conversation is relied on as proof of a confession of crime, the prisoner has a right to lay before the court the whole of what was said in that conversation; not being confined to so much only as is explanatory of the part already proved against him, but being permitted to give evidence of all that was said upon that occasion relative to the subject matter in issue. 1 Greenl. Ev., sec. 218.

If the witness called to prove the confessions of the prisoner says he does not remember all the conversation, and that a great many things were said in the conversation which he did not remember, and is still permitted to testify without even stating that he remembers the substance *of all* that was said at the time on the subject, it is obvious that the rule is violated, and the humane part of it disregarded.

The court below therefore erred in admitting Wilson to testify as to the confessions of the prisoner, and for the same reasons, the evidence of Henry Martin as to confessions was incompetent.

We do not understand the order of the court in reference to the challenge of jurors as the attorney for appellant seems to understand it. That order reads as follows: "The following additional jurors were taken, to wit: John Miller, Thomas Ballew, Joseph Turner, Fleming Shelton, Madison Shelton, Eli Smith & John Woodson, and James Taulbee were challenged by the commonwealth."

Some jurors included and named in this order were certainly taken, because it is so stated in express terms; who or which of them were taken on the panel must be determined by the grammatical and rational interpretation of the whole order.

Let the words of the sentence be slightly transposed so as to read thus: "The following additional jurors, to wit, John Miller, Thomas Ballew, Joseph Turner, Fleming Shelton, Madison Shelton, Eli Smith, were taken; and John Woodson and James Taulbee were challenged by the commonwealth." This sentence con-

tains every word that is in the order and not one more; the words composing each are identically the same, and every word has its appropriate and ordinary meaning, and everyone of common understanding who should read it would know that the six persons first named in the order were taken on the jury, and the two last named were challenged. Whereas, if the construction contended for be allowed, the two words "were taken" must be wholly rejected, as no meaning could be given to them if the attorney's interpretation prevails. The character "&," representing the conjoining word "and," immediately following the name Eli Smith, denotes that something is to be added to what preceded; which addition may be "and John Woodson and James Taulbee were challenged," etc., which is consistent with both the rules of grammar and the propriety of speech.

To the first instruction, given on motion of the attorney for the commonwealth, there seems to be no available objection; but the second is erroneous and prejudicial to appellant, for it not only assumes as proved that the knife was a dangerous weapon and was concealed from the deceased, but it confines the apprehension of the danger of death or great bodily harm on the part of appellant to the time when he agreed to fight the deceased, instead of also extending it to the time when the stabbing was done.

Appellant may have had no apprehension of serious injury from deceased when he agreed to fight him; but during the fight, something may have occurred to create a reasonable belief that he was *then* in danger of death or great bodily harm from deceased, and on account of the fear thus apprehended, used his knife.

The third instruction, like the second, excludes from the jury the consideration of the fact whether *at the time* appellant used his knife he had reasonable grounds to believe, and did believe, that he was in danger of death or great bodily harm from deceased, and assumes that the knife was a dangerous weapon, and appellant concealed it from deceased, instead of submitting the facts to the jury to be determined by them from the evidence.

Instruction No. 4 should have been qualified by the addition of the following, after the words stabbed and killed the deceased: "Unless the defendant had reasonable grounds to believe, and did believe at the time, that he was in danger of losing his life

or suffering great bodily harm from the deceased. And instruction No. 5 should have been qualified in the same way. Instructions Nos. 6, 7 and 8 seem to be unobjectionable.

All those asked for by appellant were given except No. 3, and that we think was properly refused for several reasons. In the first sentence of the instruction, the jury were authorized to acquit him if they believed, from the evidence, that defendant was under bonds to keep the peace, and deceased knew that fact, and brought on the difficulty for the purpose of killing him or doing him great bodily harm, although there was not at the time any *real* or apparent danger to defendant of death or great bodily harm, making the homicide excusable if the jury believed, from the evidence, that the deceased brought on the fight with the intention of killing defendant or doing him great bodily harm, although at the time he gave the fatal stab there was no reasonable ground to believe, and although he might not have believed, that he was in danger of being killed or of suffering great bodily harm. And by another sentence in said instruction, they were authorized to acquit defendant if, from mere threats before and at the time of the fight, and from other circumstances surrounding the parties, he had reasonable ground to believe, and did believe that he was in continued *danger*, not that he was in danger of losing his life and suffering great bodily harm, but any danger, even slight personal injury, either then or at any future time. This was not the law of the case, and the court below did not err in refusing to give it.

But for the reasons before stated, the judgment is reversed, and the cause is remanded, with directions to award to appellant a new trial, and for further proceedings consistent herewith; which is ordered to be certified to the court below.

Judgment reversed.

WELLAR vs. PEOPLE.

(30 Mich., 16.)

HOMICIDE: *Manslaughter — Evidence — Practice — Duty of prosecution in calling witnesses.*

In a prosecution for homicide, where it appears that no weapon was used, but that death resulted from a blow or a kick not likely to cause death, the offense is manslaughter and not murder, although the assault be unlawful

and malicious, unless the respondent did the act with intent to cause death or grievous bodily harm, or to perpetrate a felony, or some act involving all the wickedness of a felony.

On a trial for homicide, it is proper to prove the relations in which the deceased and accused lived with one another.

On a trial for homicide, it is proper to prove the respective strength of the parties, but not by evidence of specific acts.

In cases of homicide, it is the duty of the prosecution, ordinarily, to call and examine, on behalf of the people, all those witnesses who were present at the transaction, or who can give direct evidence on any material branch of it, whether such witnesses be favorable or unfavorable to the prosecution.

ERROR to *Saginaw Circuit*.

William H. Sweet and *William A. Clark*, for plaintiff in error.

Isaac Murston, Attorney General, for the people.

CAMPBELL, J. Plaintiff in error was convicted of the murder of *Margaret Campbell*, by personal violence committed on July 25, 1873. They had lived together for several months, and on the occasion of her death, she had been out on an errand of her own in the neighborhood, and on coming back into the house, entered the front door of the bar-room, and fell, or was knocked down upon the floor. While on the floor, there was evidence tending to show that *Wellar* told her to get up, and kicked her, and that he drew her from the bar-room, through the dining-room into a bed-room, where he left her, and where she afterwards died. The injury of which she died was inflicted on her left temple, and the evidence does not seem to have been clear how she received it, or at what specific time. It was claimed by the prosecution to have been inflicted by a blow when she first came in, and if not, then by a blow or kick afterwards. All of the testimony is not returned, and the principal questions arise out of rulings which depend on the assumption that the jury might find that her death was caused by some violent act of *Wellar's*; which they must have done to convict him. There can be no question but that, if she so came to her death, he was guilty of either murder or manslaughter. The complaint made against the charge is that a theory was put to the jury, on which they were instructed to find as murder what would, or at least might, be manslaughter.

There was no proof tending to show the use of any weapon, and, if we may judge from the charge, the prosecution claimed

the fatal injury came from a blow of *Wellar's* fist, given as she entered the house. The judge seems to have regarded it as shown by a preponderance of proof, that the injury was invisible when she was in the bar-room, and that the principal dispute was as to how it was caused, whether by a blow, or kick, or by accident. It also appears that, if inflicted in that room, it did not produce insensibility at the time, if inflicted before the prisoner dragged her into the bed-room. It does not appear from the case at what hour she died.

It may be proper to remark that, while it is not desirable to introduce all the testimony into a bill of exceptions, in a criminal case, it is important to indicate in some way the whole chain of facts which the evidence tends to prove. Without this, we cannot fully appreciate the relations of many of the rulings, or know what instructions may be necessary to be sent down to the court below. The bill before us is full upon some things, but leaves out some things which it would have been better to include.

Upon any of the theories presented, there is no difficulty in seeing that if *Wellar* killed the deceased, and if he distinctly intended to kill her, his crime was murder. It is not claimed on his behalf that there was any proof which could reduce the act to manslaughter, if there was a specific design to take life. Upon this the charge was full and pointed, and is not complained of. There was no claim that he had been provoked in such a way or to such an extent as to mitigate the intentional slaying to anything below one of the degrees of murder.

But it is claimed that although the injury given was fatal, yet, if not intended to produce any such results, it was of such a character that the jury might, and probably should, have considered it as resting on different grounds from those which determine responsibility for acts done with deadly weapons used in a way likely to produce dangerous consequences. But the charge of the court did not permit them to take that view.

It will be found, by careful inspection of the charge, that the court specifically instructed the jury, that if *Wellar* committed the homicide at all, it would be murder, and not manslaughter, unless it was committed under such extreme provocation as is recognized in the authorities as sufficient to reduce intentional and voluntary homicide, committed with a deadly weapon, to

that degree of crime. And in this connection, the charge further given that, if the intent of the respondent was to commit bodily harm, he was responsible for the result, because he acted wilfully and maliciously in doing the injury, necessarily led to a conviction of murder, because there was no pretense of any provocation of that kind.

Manslaughter is a very serious felony, and may be punished severely. The discretionary punishment for murder in the second degree comes considerably short of the maximum punishment for manslaughter. But the distinction is a vital one, resting chiefly on the greater disregard of human life shown in the higher crime. And in determining whether a person who has killed another, without meaning to kill him, is guilty of murder or manslaughter, the nature and extent of the injury or wrong which was actually intended must usually be of controlling importance.

It is not necessary in all cases that one held for murder must have intended to take the life of the person he slays by his wrongful act. It is not always that he must have intended a personal injury to such person. But it is necessary that the intent with which he acted shall be equivalent in legal character to a criminal purpose aimed against life. Generally the intent must have been to commit either a specific felony, or at least an act involving all the wickedness of a felony. And if the intent be directly to produce a bodily injury, it must be such an injury as may be expected to involve serious consequences, either periling life or leading to great bodily harm. There is no rule recognized as authority which will allow a conviction of murder where a fatal result was not intended, unless the injury intended was one of a very serious character, which might naturally and commonly involve loss of life, or grievous mischief. Every assault involves bodily harm. But any doctrine which would hold every assailant as a murderer, where death follows his act, would be barbarous and unreasonable.

The language used in most of the statutes on felonious assaults is, an intent to do "grievous bodily harm. Carr. Sup., p. 237. And even such an assault, though "unlawfully and maliciously" made, is recognized as one where, if death followed, the result would not necessarily have been murder. *Id.* Our own statutes have made no provision for rendering an assault felonious.

ous, unless committed with a dangerous weapon, or with an intent to commit some felony. Comp. L., ch. 244.

In general, it has been held that where the assault is not committed with a deadly weapon, the intent must be clearly felonious, or the death will subject only to the charge of manslaughter. The presumption arising from the character of the instrument of violence is not conclusive in either way, but where such weapons are used as do not usually kill, the deadly intent ought to be left in no doubt. There are cases on record where death by beating and kicking has been held to warrant a verdict of murder, the murderous intent being found. But where there was no such intent, the ruling has been otherwise. In *State v. McNab*, 20 N. H., 160, it is held that unless the unlawful act of violence intended was felonious, the offense was manslaughter. The same doctrine is laid down in *State v. Smith*, 32 Me., 369. That is the statutory rule in New York and in some other states.

The wilful use of a deadly weapon, without excuse or provocation, in such a manner as to imperil life, is almost universally recognized as showing a felonious intent. See 2 Bish. Cr. L., §§ 680, 681. But where the weapon or implement used is not likely to kill or to maim, the killing is held to be manslaughter, unless there is an actual intent which shows a felonious purpose. See *Turner's Case*, 1 Raym., 144, where the servant was hit on the head with a clog; *State v. Jarrott*, 1 Ired., 76, where the blow was with a hickory stick; *Holly v. State*, 10 Humph., 141, where a boy threw a stone; *Rex v. Kelly*, 1 Moo., C. C., 113, where it was uncertain whether a person was killed by a blow with the fist, which threw him on a brick, or by a blow from a brick, and the court held it a clear case of manslaughter. In *Darry v. People*, 10 N. Y., 120, the distinctions are mentioned and relied upon, and in the opinion of PARKER, J., there are some remarks very applicable. In the case of *Com. v. Webster*, 5 Cush., 295, the rulings of which have been regarded as going beyond law in severity, this question is dealt with in accordance with the same views, and quotations are given from East to the same purport.

The case of death in a prize fight is one of the commonest illustrations of manslaughter, where there is a deliberate arrangement to fight, and where great violence is always to be expected from the strength of the parties and the purpose of fighting till

one or the other is unable to continue the contest. A duel with deadly weapons renders every killing murder; but a fight without weapons, or with weapons not deadly, leads only to manslaughter, unless death is intended. 1 East P. C., 270; *Murphy's Case*, 6 C. & P., 103; *Hargrave's Case* 5 id., 170.

The case of *Commonwealth v. Fox*, 7 Gray, 585, is one resembling the present in several respects, in which the offense was held manslaughter.

The jury were sufficiently and rightly charged upon the extent of the respondent's liability for any intended killing. And if respondent wilfully and violently kicked the deceased in such a way as he must have known would endanger her life, and her life was destroyed in that way, an actual intention of killing would not be necessary, as in such case the death would have been a result he might fairly be held to regard as likely. But it was certainly open to him to claim that, whatever may have been the cause of death, he did nothing which was designed to produce any serious or fatal mischief, and that the injury from which the deceased came to her death was not intentionally aimed at a vital spot, or one where the consequences would be probably or manifestly dangerous. We have no right to say that there was no room for a verdict of manslaughter, and the effect of the charge was to deny this.

Most of the other questions are of such nature that, if arising on another trial, they will be presented in a more guarded form. We have no doubt it is proper to show the previous relations of Wellar and the deceased, and that they may be of more or less importance in explaining conduct and motives. We are also inclined to think it would not be incompetent to show the physical strength of the respective parties. It is objectionable, however, to prove these things by evidence of specific acts, especially where inferences might be drawn unfavorable to the prisoner's character, which would not be relevant to the charge. These inquiries should be general, and not leading, and should not, where it can be avoided, introduce irrelevant matter.

We also think it was not correct practice to compel the defense, instead of the prosecution, to call the witness Maladay. It appeared that he was one of two persons present at the occurrence for which Wellar was on trial, and it further appeared that his name was endorsed on the information as one of the people's

witnesses, so that he was not unknown to the prosecution. It devolves on the prosecutor in a case of homicide, to connect the prisoner with the injury which is claimed to have been the cause of death, and to give all the testimony in his power going to the proof of the *corpus delicti*. The fact that the name of a witness is endorsed on the information does not of itself involve any necessary obligation to do any more than have the witness in court ready to be examined. *Rex v. Simonds*, 1 C. & P., 84; *Rex v. Beezley*, 4 id., 220; *Reg. v. Bull*, 9 id., 22; *Reg. v. Bodle*, 6 id., 186; *Reg. v. Vincent*, 9 id., 91; *Rex v. Harris*, 7 id., 581. But in cases of homicide, and in others where analogous reasons exist, those witnesses who were present at the transaction, or who can give direct evidence on any material branch of it, should always be called, unless, possibly, where too numerous. If there is any other admissible reason, none has yet been passed upon, and none has been presented which could apply to the case before us. If some one were to come forward and assert his presence when he had not been seen or noticed by others, there might be room for questioning his position. But where there is no doubt or dispute as to the fact of presence, no such question can arise, and the only objection then will be, that he may not be favorable to the prosecution. But this is no answer, any more than it would be if a subscribing witness stood in a similar position. As explained in *Hurd v. People*, 25 Mich., 406, and in the English cases there referred to, a public prosecutor is not a plaintiff's attorney, but a sworn minister of justice, as much bound to protect the innocent as to pursue the guilty, and he has no right to suppress testimony. The fact that he is compelled to call these witnesses, when he may not always find them disposed to frankness, entitles him, when it appears necessary, to press them with searching questions. *Reg. v. Ball*, 8 C. & P., 745; *Reg. v. Chapman*, 8 id., 558. By this means, and by laying all the facts before the jury, they are quite as likely to get at the truth as if he were allowed to impeach the witnesses who disappointed him. Any intelligent jury will readily discover, whether a witness whom the prosecutor has been compelled to call is fair or adverse, and can make all proper allowance for bias, or any other influence which may affect his credit. If there is but a single eye witness, he could not be impeached, and yet the danger of falsehood is quite as great, and the chances of its

correction much less than where there are two, and both are called. And if such a witness need not be called by the prosecution, the defense cannot impeach him, and must either call him, and run the risk of finding him against them, or, if they fail to call him, be prejudiced by the argument that they have omitted to prove what was in their power, and must have done so because they dared not call out the facts. There is no fairness in such a practice, and a prosecutor should not be permitted to resort to it. He is not responsible for the shortcomings of his witnesses, and he is responsible for any obstacle thrown in the way of eliciting all the facts.

The judgment must be reversed, and a new trial granted. The respondent to be remanded to the custody of the sheriff of Saginaw county.

COOLEY and CHRISTIANCY, JJ., concurred.

GRAVES, C. J., did not sit in this case.

LYNCH vs. COMMONWEALTH.

(77 Pa. St., 205.)

HOMICIDE: Provocation — Manslaughter — Insanity — Summoning jury.

Any error in this case in the summoning of the jury held cured by the statute of amendment.

Where the prisoner, who lived with his sister, a married woman, went home late at night and, hearing a noise in his sister's room, became suspicious that something wrong was going on; and, after listening awhile, becoming convinced that his suspicions were well founded, took out his knife and opened it, broke open the door, and found his sister in the room in her night dress, and deceased in the bed, and, being greatly enraged, killed the adulterer, it was *held*, as a matter of law, that this was not such provocation as reduced the killing to manslaughter.

It seems that seeing a married sister in the act of adultery is not such provocation as to reduce the killing of the adulterer to manslaughter.

Where insanity is relied on as a defense to a charge of murder, the defendant must satisfy the jury that he was insane at the time of the killing. A doubt as to his sanity is not sufficient.

READ, C. J. By the second section of the Act of the 10th of April, 1867, it is made the duty of the jury commissioners, president judges, or additional judges of their respective districts, to meet at the seat of justice of the county at least thirty

days before the first term of the court of common pleas, in every year, and select the jurors agreeably to the provisions of said section, who are to serve as jurors in the several courts of such county during that year. The names of the persons so selected shall be placed by them, or a majority of them, in the proper wheel, in the mode and manner directed by law. The third section describes how the jury commissioners and sheriff shall draw from the proper jury wheel the different panels of jurors.

The precepts in this case, and the venires for the grand and petit or traverse jurors, were issued on the 2d of April, 1872, and on the 15th of the same month, were returned in due form by the sheriff and jury commissioners, by whom the names of the grand and traverse jurors were drawn from the jury wheel in due form of law. The error assigned in both cases is the same; the clerical error of using the words "commissioners of said county," instead of "jury commissioners." Everything else in the whole proceeding was right, and the alleged error was not discovered until several months after the trial.

These alleged defects or errors are cured by the 53d section of the Criminal Procedure Act of the 31st of March, 1860, which enacts that "no verdict in any criminal court shall be set aside, nor shall any judgment be arrested or reversed, nor sentence delayed for any defect or error in the *præcipe* issued from any court, or the venire issued for the summoning and returning of jurors, or any defect or error in drawing or returning any juror or panel of jurors, but a trial or agreement to try on the merits, or pleading guilty on the general issue in any case, shall be a waiver of all error and defects in or relative or appertaining to the said precept, venire, drawing, or summoning and returning of jurors."

Ambrose E. Lynch was indicted for the murder of William Hadfield, on the night of the 12th of June, 1872, by stabbing him with a knife, and was tried in July, of the same year, and convicted of murder in the first degree. The circumstances attending the murder are few, and may be told very briefly. The sister of the plaintiff in error lived in a small house in Allegheny City, of whom the defendant Lynch was a guest. Late at night Lynch came in by a side door, and was in only a few minutes when he heard a noise; listened, and heard a creaking;

took out his knife and opened it; he put his shoulder to the door and shoved it; it did not go in the first time; put his shoulder to it the second time and it went in, and he saw his sister getting out of bed. He struck the deceased twice in the back, in the bed, with his knife, and a third time, when on the floor, in the breast. This last was the mortal wound, of which Hadfield died between twelve and one o'clock the same night. We have omitted the profane and blasphemous language made use of by the defendant Lynch.

We have read over, with great care, the very able charge of Judge STARRETT, who explains very fully to the jury the different degrees of felonious homicide, murder in the first degree, murder in the second degree, voluntary and involuntary manslaughter.

This brings us naturally to a part of the charge following this explanation, which is assigned as the fifth error. It is evident, from the language used, that the prisoner's counsel was endeavoring to reduce the crime to that of voluntary manslaughter, with which the court certainly did not agree. "It is claimed," said the learned judge, "by the prisoner in this case, that on going to his sister's house at a late hour in the night, he heard a noise in her room; suspected that something wrong was going on there; listened awhile, and becoming convinced that his suspicions were well founded, he took out his knife and opened it, put his shoulder to the door, forced it in, and found his sister there in her night dress, and the deceased in the room with her; that he was greatly excited and enraged, and in the heat of passion thus generated, he stabbed the deceased twice in the back and once in the breast. Assuming all this to be true, does it amount in law to sufficient cause of provocation to reduce the killing to manslaughter? We are of opinion that it does not; that there is nothing in these circumstances, as they are claimed to exist, by the prisoner, that would reduce the grade of the offense to voluntary manslaughter. It is the duty of the court to say, as a matter of law, what fact or facts will amount to sufficient legal provocation if they are found by the jury. In other words, it is for the jury to find what the facts are, and for the court to say what effect shall be given them. Assuming, then, the facts to be as claimed by the prisoner, in this regard, we say that they do not amount to sufficient or legal provocation, such

as would reduce the grade of a felonious homicide to manslaughter.

In all this there was clearly no error. The third error assigned is, to the answer of the court to the defendant's first point, which was, "that if on the night of the killing, defendant found, or supposed he found, the deceased in bed with defendant's married sister, and was thereby so much excited as for the time to overwhelm his reason, conscience and judgment, and cause him to act from an uncontrollable and irresistible impulse, the law will not hold him responsible."

This seems very vague and uncertain, but the court say, "as the point seems to amount to the proposition, that if the prisoner was temporarily insane at the time he did the cutting, he is not guilty of any legal offense, it is affirmed as an abstract principle of law. If the defendant was actually insane at the time, this of course relieves him from criminal responsibility, from whatever cause the insanity arose.

But the jury must not confound anger or wrath with actual insanity; because, however absurd or unreasonable a man may act when exceedingly angry, either with or without cause, if his reason is not actually dethroned, it is no legal excuse for violation of law." There is no error in this answer.

The fourth error assigned is to the answer to the defendant's second point, which is: "That if the jury have a reasonable doubt as to the condition of defendant's mind, at the time the act was done, he is entitled to the benefit of such doubt, and they cannot convict."

As to the second point, the court said, "the law of the state is, that when the killing is admitted, and insanity or want of legal responsibility is alleged as an excuse, it is the duty of the defendant to satisfy the jury that insanity actually existed at the time of the act, and a doubt as to such insanity will not justify the jury in acquitting upon that ground. The law presumes sanity when an act is done, if no insanity is shown by the evidence, and when it appears a man was sane shortly preceding the act, and shortly after, the presumption of sanity exists at the time of the act, and no jury have a right to assume otherwise, unless evidence in connection with the act convinces them that the defendant was actually insane at the moment the act was committed. This point is refused, and rightly, and it needs no ar-

gument to show that the court were entirely correct in their ruling and answer.

The sixth error is not sustained, for it is clear the ingredients necessary to constitute murder in the first degree were proved to exist, and in determining this to be the case, we have reviewed both the law and the evidence.

Sentence affirmed and record remitted.

RAFFERTY vs. PEOPLE.

(69 Ill., 111.)

HOMICIDE: *Arrest — Warrant issued in blank.*

On a trial for murder, where evidence was given by the respondents that the homicide was committed by the respondent in resisting an utterly illegal and unjustifiable arrest, attempted by the deceased who was a policeman, it was *held* that the offense was no more than manslaughter, and that the court erred in excluding this evidence from the consideration of the jury.

A warrant signed by a magistrate in blank and afterwards filled up by a police sergeant with whom it had been left has, although regular on its face, no legal force or validity whatever, but is an absolute nullity; and if an officer is killed in attempting to make any arrest under it, the offense is but manslaughter.

SCOTT, J. dissenting.

McALLISTER, J. The plaintiff in error having been found guilty upon an indictment, for the murder of one Patrick O'Meara, and sentenced to suffer the penalty of death, has caused the evidence, together with the rulings of the court and exceptions taken, to be preserved in a bill of exceptions, and brought the record to this court for review, upon writ of error.

Various errors have been assigned, among which is the exclusion of proper evidence, and overruling his motion for a new trial.

We propose to consider but one question presented, and that is one vitally affecting the merits of the case, and which we cannot disregard without overriding a plain and well settled rule of law, based upon a foundation no less solid than the natural rights of personal liberty and security — rights held sacred by the common law, and recognized and protected by constitutional enactments.

The record contains evidence tending to show that the homicide was committed by the prisoner in resisting the deceased, who was a policeman of the city of Chicago, whilst engaged in connection with another policeman, whom he was aiding, in the act of committing an illegal and wholly unjustifiable invasion of plaintiff's liberty, by attempting to seize his person and take him off to prison, without any authority in law so to do.

The circumstances, which the evidence tends to prove, were briefly these: At a little after midnight of the night of the 4th, and in the early morning of the 5th of August, 1872, the prisoner was sitting quietly and peaceably by a table in a saloon, when O'Meara, the deceased, and another policeman of the name of Scanlan, came in. O'Meara immediately pointed the prisoner out to Scanlan. The prisoner upon seeing O'Meara, addressed him in a friendly manner, asking him to take something to drink, or a cigar, which was declined. Scanlan then went directly up to the prisoner, tapped him on the shoulder, and told him he had a warrant for him. The prisoner demanded the reading of the warrant, which was done, and the prisoner apparently submitted to the arrest; but immediately threatened to shoot the first man who should lay a hand upon him. O'Meara, who came with a slung shot hung to his wrist, stationed himself at the outer door to prevent prisoner's escape, while Scanlan kept himself in position to guard a back door.

All this occurred in a brief space of time; and while O'Meara, with a slungshot suspended from his wrist was thus guarding the door which led into the street, the prisoner shot him with a pistol, inflicting a mortal wound. There is not the slightest pretense in the case that the prisoner had been accused or suspected of having committed any felony, or that he, at any time, was in the act of committing a misdemeanor, or even any violation of a city ordinance. The facts appearing from the tendency of the evidence are, that the homicide was committed while the deceased was assisting in the arrest of the prisoner under the circumstances stated. No attempt was made by the state's attorney, on the trial, to show that the prisoner had been charged with the commission of any felony, or to prove that either of the policemen in question had in their possession, at the time, any lawful writ or warrant authorizing the prisoner's arrest. But the counsel for the prisoner caused to be produced and

identified the supposed warrant which the policeman had, and upon which the arrest was made, and established, by undisputed evidence, that police sergeant Hood had in his drawer a number of blank summonses and warrants, which had been signed by police magistrate Banyon, and which the sergeant had been accustomed to fill up in the absence of the magistrate, and use, from time to time, as exigencies might require. That from these blanks he, on Sunday, August 4, 1872, filled up the one in question, putting the prisoner's name into it, in the absence of the magistrate; and to avoid the appearance of having been issued on Sunday, it was dated the 5th of August. This paper was delivered to Scanlan, and he and O'Meara proceeded, as the evidence clearly shows, to hunt for the prisoner all that Sunday night, with the intention of arresting him on that pretended process, as soon as midnight was passed, if they could find him. When the supposed warrant was introduced in evidence, and the testimony showing how it was brought into existence was given, the court, upon the motion of the state's attorney, excluded the warrant and all evidence relating to it, from the jury, as incompetent; to which the prisoner's counsel excepted.

The supposed warrant, as filled out by the sergeant, was directed to any constable or policeman of the city of Chicago, commanding them to take the body of one Christopher Rafferty, and bring him forthwith before the magistrate, unless special bail should be entered; and if such bail should be entered, then to command Rafferty to appear before such magistrate at eight o'clock A. M., on the 10th day of August, 1872, at his office, etc., "to answer the complaint of the city of Chicago in a plea of debt for a failure to pay said city a certain demand, not exceeding one hundred dollars, for a violation of an ordinance of said city, entitled an ordinance for revising and consolidating the general ordinances of the city of Chicago, passed October 23, 1865, to wit: For *committing a breach of the peace, and making an improper noise and disturbance in said city, or for using threatening or abusive language towards another person*, tending to a breach of the peace, in violation of section 29 of chapter 25 of said ordinance, and hereof make due return as the law directs.

"Given under my hand and seal this 5th day of August, 1872.

"[SEAL.]

A. H. BANYON, *Justice of the Peace.*"

The sixth section of chapter eleven of the charter of Chicago (Gary's Laws, 114) declares as follows: "In all prosecutions for any violation of any ordinance, by-law, police or other regulation, the first process shall be a summons, *unless oath or affirmation be made for a warrant, as in other cases.*" And by section 1 of chapter 33 of ordinances (Gary's Laws, 306), it is provided that the several members of the police force "shall have power to arrest all persons in the city *found in the act of violating any law or ordinance, or aiding and abetting in any such violation.*"

It is clear, beyond doubt, that there was not the slightest authority in Scanlan and the deceased to arrest the prisoner, unless it can be found in the supposed writ or warrant, which the court excluded. And it cannot be denied that the legality of the arrest of the prisoner was a material question in determining the character of the homicide; for it is a well established rule, that where persons have authority to arrest, and are resisted and killed in the proper exercise of such authority, the homicide is murder in all who take part in such resistance. And, on the other hand, it is equally well settled, that where the arrest is illegal, the offense is reduced to manslaughter. Foster, 270; Hale's P. C., 465.

If, therefore, it be conceded that the warrant was legal, then, inasmuch as the policeman had no authority to arrest the prisoner without it, the production of the warrant in evidence was necessary in order to a conviction for murder. But if it was, to all intents and purposes, illegal and void, then the supposed warrant and the testimony showing its nullity, were competent and proper for the accused, in order to show that the character of the homicide was manslaughter and not murder.

We have seen that, by the express provisions of the charter of Chicago, no process of the kind in question could have been lawfully issued by the magistrate himself, without an oath or affirmation made for the warrant as in other cases; and yet, we find blanks, signed by the magistrate, put into the hands of a sergeant of police, filled out by him and used as legal process with which to arrest the citizens of the state, with full knowledge, as we must presume, on the part of the magistrate and sergeant, that they were so put into use, without the required oath, and in violation of law. Such conduct is reprehensible in

the highest degree, and it is a matter of no astonishment that such tragical results followed. But when so filled out, the paper was an absolute nullity. It did not issue in the ordinary course of justice, from a court or magistrate. It did not issue from the magistrate at all; because, when it went from his control, it contained no authority, express or implied, to arrest and imprison Rafferty or anybody else.

The law on this subject is clear and explicit. "But if the process is defective in the frame of it, as, if there be a mistake in the name of the person on whom it is to be executed, *or if the name of such person, or of the officer, be inserted without authority*, or after the issuing of the process, or if the officer exceeded his authority, the killing of the officer in such case by the party would be manslaughter only." 2 Arch. Cr. Pr. and Pl., 242.

"It is a general rule that when persons have authority to arrest or imprison, and, using the proper means for that purpose, are resisted in so doing and killed, it will be murder in all who take part in such resistance." Foster, 270. But three things are to be attended to in matters of this kind; the legality of the deceased's authority, the legality of the manner in which he executed it, and the defendant's knowledge of that authority; for, if an officer be killed in attempting to execute a writ or warrant invalid on the face of it, or if issued *with a blank in it*, and the *blank afterwards filled up*, or if issued with an insufficient description of the defendant, or against the wrong person, or out of the district in which alone it could be lawfully executed; or if a private person interfere and act in a case where he has no authority by law to do so, or if the defendant have no knowledge of the officer's business, or of the intention with which a private person interferes, and the officer or private person be resisted or killed, the killing will be manslaughter only." 1 Hale's P. C., 465. See also *Housin v. Barrow*, 6 Durnf. and East, 122; *Rex v. Hood*, 1 Moo. C. C.; 1 East P. C., 110, 111.

Roscoe, in his work on Criminal Evidence, 698, says: "If the process be defective in the frame of it, as, if there be a mistake in the name or addition of the party, or if *the name of the party, or of the officer, be inserted without authority, and after the issuing of the process*, and the officer, in attempting to execute it, be killed, this is only manslaughter in the person whose liberty is invaded."

Such, undoubtedly, is the law, and the evidence excluded would bring the prisoner's case fully within it. His name was inserted in the warrant by the sergeant of police, after it had been delivered to him by the magistrate, and consequently without authority. These facts, if found by the jury, should determine the character of the homicide to be manslaughter, unless the proof showed express malice towards the deceased. 3 Greenl. Ev., p. 106, sec. 123; *Roberts v. The State*, 14 Mo., 138. No authority has been cited, and we hazard nothing in saying that none can be found which would justify the exclusion of this evidence under the circumstances of this case. The accused had the legal right to have it go to the jury, because it was material in determining the character of the homicide. This was a question exclusively for the jury, and as to which we do not wish to be understood as expressing any opinion. For this error the judgment will be reversed and the cause remanded.

Judgment reversed.

Scorr, J. I cannot yield my assent to all the reasoning of the majority of the court.

It seems to me the rule announced may be liable to an improper construction. An officer is not bound, at his peril, to judge whether the writ he is about to serve is, in fact, legal, or whether the magistrate, who issued it, was guilty of misconduct in not complying with all the provisions of the law. It would be requiring too much of him to so hold. If the opinion of the court can be construed into holding a contrary doctrine, I do not concur in it. The general rule is, the officer may rightfully execute, or assist in the execution of any process, regular on its face, without putting his life in jeopardy at the hands of offenders against the law. Any other rule would be unreasonable.

There can be no question, the law is, if a party in resisting an unlawful arrest commits a homicide, the crime will be manslaughter and not murder. It is always, however, a question of fact, to be found from the evidence.

In this view of the law, it would have been proper, no doubt, for the court to have permitted the jury to consider the evidence tendered, however slight it might be, on the question whether the homicide was in fact committed in resisting an unlawful arrest.

There is no pretense the deceased was, himself, about to serve any process, and it may be the jury will find that he was not even assisting Scanlan to arrest the accused when the fatal wound was inflicted. If so, the evidence will be immaterial.

COFFMAN vs. COMMONWEALTH.

(10 Bush, Ky., 495.)

HOMICIDE: *Confessions — Erroneous charges — Manslaughter — Self-defense — Death from surgical operation.*

Where the prosecution have proved declarations of the respondent relative to the homicide by a witness who states that he did not hear all that respondent said at the time, the respondent has a right to prove by other witnesses who were present all that he said at the time tending to exonerate himself. A charge which enumerates the facts which the evidence tends to prove is erroneous. The charge should point out the facts necessary to be found, and then leave to the counsel to argue and the jury to determine whether or not the evidence proves these facts.

It is not necessary that respondent should be without fault in order to reduce the killing of deceased by a blow of the fist in a sudden quarrel to manslaughter.

In order to excuse a homicide on the ground of self-defense, it is not necessary that there should be immediately impending danger. If the respondent believed, and had reasonable ground to believe, that there was immediate impending danger, and he had no other apparent and safe means of escape, he had a right to strike, although in fact there was no danger.

In cases of homicide, if an operation is performed on the deceased, such as an ordinarily prudent and skilful surgeon to be procured in the neighborhood would deem necessary, and such operation is performed with ordinary skill, the respondent is responsible for the death, although the operation and not the wound made by him caused the death.

In cases of homicide, if an operation is performed on the deceased, such as would not be deemed necessary by such ordinarily prudent and skilful surgeon as can be procured in the neighborhood, or if it would have been deemed necessary but was not performed with ordinary skill, and death results from the operation and not from the injuries inflicted by the respondent, the respondent ought to be acquitted, even though the injuries inflicted by him might eventually have proved fatal.

COFER, J. Having been found guilty of manslaughter, and sentenced to confinement in the penitentiary for eight years, for killing John Harrison, the appellant seeks a reversal of that judgment on two grounds: *first*, that the court erred in excluding important legal evidence offered by him; and *second*, that the court erred to his prejudice in instructing the jury.

1. A witness for the commonwealth proved declarations made by appellant relative to the homicide, but stated that he did not hear all that the appellant said at the time; and appellant offered to prove by other witnesses who were present at the time and heard the words proved by the commonwealth's witness, other statements made in the same conversation, tending to make out the defense. This was objected to and excluded; but while we regard the evidence as competent, if the declarations testified to by the witness for the appellee were introduced by the commonwealth, yet as it does not appear who brought out the evidence of the declarations, we cannot decide that the court erred in excluding the evidence offered by appellant.

2. The instructions given are nearly all objectionable because of an attempt made to enumerate the collateral facts which the evidence tended to prove, instead of being hypothecated upon the facts necessary to constitute guilt or to make out a defense. The objection to an attempt to enumerate the facts which the evidence tends to prove, instead of basing the instructions on the facts necessary to be found by the jury, is that it unnecessarily lengthens the instructions, and is on that account calculated to confuse and mislead the jury; and it is liable to the further objection that by giving prominence to the facts enumerated, other facts not recited seem to be subordinated, and may on that account be overlooked by the jury; or they may conclude that as the court has referred to a part and omitted to mention other facts which the evidence tends to prove, such facts were deemed by the court of no importance. Instructions ought, therefore, as a general rule, to be based only upon such facts as must be found by the jury in order to establish guilt or to make out a defense, thus leaving to counsel to argue the evidence tending to establish the essential facts, and to the jury to decide how far the evidence establishes them.

The jury were told in substance, in the second instruction, that if the appellant and the deceased had a sudden quarrel, and *without fault on his part*, appellant in sudden heat and passion, and not to defend himself from *immediate, impending and threatened* danger, struck the deceased and knocked him down, and he was injured by the fall and died from the injury, they should find the appellant guilty of manslaughter.

This instruction does not correctly lay down the law of self-

defense, and is also objectionable on the ground that it required that the appellant should have been *without fault* before the heat of passion could reduce a killing done by a blow of the fist in a sudden quarrel from murder to manslaughter. It is not necessary, in order to excuse a homicide on the ground of self-defense, that there should be actual, *immediate, impending* danger. If the appellant believed, and had reasonable ground to believe, there was immediate impending danger, and he had no other apparent and safe means of escape, he had a right to strike, although the supposed danger may not in fact have existed.

In the third instruction, the jury were told that if an altercation took place between the parties in a grocery, where they seem to have met, and the deceased invited the appellant to go with him into the street and settle the matter, and the appellant voluntarily went with him to settle the matter, and after getting into the street, angry words were used by both, and both were ready and willing to fight, and they did fight, and appellant wounded the deceased, and he died from the effect of the wounds, appellant was guilty of manslaughter. This instruction was erroneous. The appellant may have gone out for an amicable settlement and with no hostile intention; and if he did so, and a quarrel arose and a fight ensued, his right of self-defense was unaffected by the fact that he had gone voluntarily.

The qualification of the fifth instruction was also erroneous. In it the jury were told, after a recital of many facts which the evidence tended to prove, that if in view of such facts appellant believed and had reasonable grounds to believe deceased would proceed immediately to inflict bodily harm upon him with a knife, and that he would do so unless prevented by such act of self-defense as was then in his power, then appellant's acts were excusable on the ground of self-defense and apparent necessity. Thus far, aside from the improper recital of collateral facts, the instruction was correct, but it was qualified as follows: "*Unless the jury find that when the parties went out to settle the matters between them, not in an amicable way, but by force and violence, or in any way that might arise between them, then they cannot acquit on the ground of self-defense and apparent necessity, and will find as stated in the third instruction*"—*i. e.*, for manslaughter. The qualification was clearly erroneous, because it assumed that the parties went out to settle matters between them, *not in*

an amicable way, but by force and violence, or in any way that might arise between them.

The evidence tended to prove that the appellant knocked the deceased down with his fist, and that he fell with his head against a post from which a nail protruded one-half or three-quarters of an inch, and that his head struck the nail and the scalp was cut; that the appellant stamped upon the body of the deceased with his foot, and that the latter was insensible from that time until his death, the symptoms indicating that there was compression of the brain.

A medical witness testified that he cut into the skull at the wound made by the nail, but discovered no evidence of injury to the bone; but he, and other physicians, believing there was compression or extravasation of blood on the brain, and that the patient would die unless he could be relieved by trephining, they as a last resort sawed out a piece of the skull-bone about an inch in diameter and removed it, and found clotted blood resting on the brain; that they did not remove the blood, but placed the piece of bone in the aperture and left it there. This was a day or two before the patient died.

In view of this evidence the court gave the following instructions, viz.: "The court instructs the jury that though they may believe the death of Harrison was caused by the surgical operation, *yet if the operation was performed by physicians as a remedy for the wounds inflicted by the defendant, they cannot acquit him on that ground.*"

We cannot approve this as a principle of the law of the land. The mere fact that the operation was performed by physicians as a remedy for the wounds inflicted by the appellant, without any reference to the question whether such an operation was reasonably deemed to be necessary, or was performed by men of ordinary skill as surgeons, or in an ordinarily skilful manner, cannot render the appellant legally responsible for the death of Harrison, if in fact the operation and not the injuries inflicted by him caused his death.

The rule deducible from the authorities seems to be that where the wound is apparently mortal, and a surgical operation is performed in a proper manner, under circumstances which render it necessary in the opinion of competent surgeons, upon one who has been wounded by another, and such operation is itself the

immediate cause of the death, the person who inflicted the wound will be responsible. *Commonwealth v. McPike*, 3 Cush., 181; *Parsons v. The State*, 21 Ala., 300. But if the death resulted from grossly erroneous surgical or medical treatment, the original author will not be responsible. 21 Ala., 300.

It should, therefore, have been left to the jury in this case to say whether the operation performed on the deceased was such as ordinarily prudent and skilful surgeons, such as were to be procured in the neighborhood, would have deemed necessary under the circumstances in view of the condition of the patient, and whether it was performed with ordinary skill; and they should have been told that if they found the affirmative of these propositions, the appellant was responsible, although the operation and not the wound inflicted by him caused the death; but that, if they found that the operation would not have been deemed necessary by such ordinarily prudent and skilful physicians and surgeons, or if it would have been deemed necessary and was not performed with ordinary skill, and the death resulted from the operation and not from the injuries inflicted by appellant, they ought to acquit him, even though they might believe such injuries would eventually have proved fatal.

For the errors indicated, the judgment is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

ORTWEIN vs. COMMONWEALTH.

(76 Pa. St., 414.)

HOMICIDE: *Insanity.*

A charge that "if the jury have a reasonable doubt of the sanity of the prisoner at the time of the killing, they cannot convict" is properly refused.

To justify an acquittal, in cases of homicide, on the ground of insanity, the evidence must be sufficient to satisfy the minds of the jury that the respondent was insane at the time of the killing. A doubt is not sufficient.

AGNEW, C. J. The chief question in this case arises under the fifth point of the prisoner, which was negatived by the courts below. It is this:

5. If the jury have a reasonable doubt of the sanity of the prisoner at the time of the killing, they cannot convict.

The industry of the able counsel of the prisoner has collected and classified many cases on this point. While we think their weight accords with our own conclusions, we cannot help perceiving, in their number and variety, that the decision of the question should rest rather on a sound basis of principle than on the conclusions of other courts. In order to apprehend the true force of the principles to be applied, we must keep in the foreground the facts of the case before any question of insanity can arise. Insanity is a defense. It presupposes the proof of the facts which constitute a legal crime, and is set up in avoidance of punishment. Keeping in mind, then, that an act of wilful and malicious killing has been proved and requires a verdict of murder, the prisoner, as a defense, avers that he was of unsound mind at the time of the killing, and incapable of controlling his will; and, therefore, that he is not legally responsible for his act. This is the precise view that the statute itself takes of the defense, in declaring the duty of the jury in respect to it. The 66th section of the Criminal Code of 31st March, 1860, taken from the act of 1836, provides: "In every case in which it shall be given in evidence, upon the trial of any person charged with any crime or misdemeanor, that such person was insane at the time of the commission of such offense, and he shall be acquitted, the jury shall be required to find specially whether such person was insane at the time of the commission of such offense and declare whether he was acquitted by them on the ground of such insanity." Thus the verdict must find the fact of insanity, and that the acquittal is because the fact is so found. The law then provides for the proper custody of the insane prisoner. This being the provision of the statute, it is evident that a jury, before finding the fact of insanity specially, must be satisfied of it by the evidence. A reasonable doubt of the fact of insanity cannot, therefore, be a true basis of the finding of it as a fact, and as ground of acquittal and of legal custody. To doubt one's sanity is not necessarily to be convinced of his insanity.

It has been said in a nearly analogous case, "As to whether a reasonable doubt shall establish the existence of a plea of self-defense, I take the law to be this: If there be a reasonable doubt that any offense has been committed by the prisoner, it operates to acquit. But, if the evidence clearly establishes the killing by

the prisoner, purposely, with a deadly weapon, an illegal homicide of some kind is established, and the burden then falls upon the prisoner, and not on the commonwealth, to show that it was excusable as an act of self-defense. If, then, his extenuation is in doubt, he cannot be acquitted of all crime, but must be convicted of homicide in some one of its grades — manslaughter at least. *Commonwealth v. Drum*, P. F. Smith, 22. Such, also, was the opinion of the late Chief Justice LEWIS, a most excellent criminal law judge, when president of the Lancaster county oyer and terminer, in the trial of John Haggerty, in the year 1847. Lewis, U. S. Crim. Law, 402. He said, p. 406: "The jury will decide upon the degree of intoxication, if any existed, and upon the existence of insanity. The burden of proof of this defense rests upon the prisoner; the fact of killing under circumstances of deliberation detailed in this case being established, the insanity which furnishes a defense must be shown to have existed at the time the act was committed. The evidence must be such as satisfies the minds of the jury." Thus, according to both statutory and judicial interpretation, the evidence to establish insanity as a defense must be satisfactory, and not merely doubtful.

If we now analyze the subject, we shall find that this is the only safe conclusion for society, while it is just to the prisoner. Soundness of mind is the natural and normal condition of man, and is necessarily presumed, not only because the fact is generally so, but because a contrary presumption would be fatal to the interests of society. No one can justly claim irresponsibility for his act contrary to the known nature of the race of which he is one. He must be treated and be adjudged to be a reasonable being until a fact so abnormal as a want of reason positively appears. It is, therefore, not unjust to him that he should be so conclusively presumed to be, until the contrary is made to appear on his behalf. To be so made to appear to the tribunal determining the fact, the evidence of it must be satisfactory and not merely doubtful, as nothing less than satisfaction can determine a reasonable mind to believe a fact contrary to the course of nature. It cannot, therefore, be said to be cruel to the prisoner, to hold him to the same responsibility for his act, as that to which all reasonable beings of his race are held, until the fact is positively proved that he is not reasonable. This statement derives additional force from the opinion of Chief Justice Gibson,

in the case of *The Commonwealth v. Mashler*, tried before him and Justices Bell and Coulter, in Philadelphia, and quoted from in Lewis's U. S. C. L., 403-4. "Insanity," he says, "is mental or moral, the latter being sometimes called homicidal mania, and properly so. A man may be mad on all subjects, and then, though he may have a glimmering of reason, he is not a responsible agent. This is general insanity; but if it be not so great in its extent or degree as to blind him to the nature and consequences of his moral duty, it is no defense to an accusation of crime. It must be so great as entirely to destroy his perception of right and wrong, and it is not until that perception is thus destroyed that he ceases to be responsible. It must amount to delusion or hallucination controlling his will, making the commission of the act, in his apprehension, a duty of overruling necessity." Again: "Partial insanity is confined to a particular subject, being sane on every other. In that species of madness it is plain that he is a responsible agent if he were not instigated by his madness to perpetrate the act. He continues to be a legitimate subject of punishment, although he may be laboring under a moral obliquity of perception, as much so as if he were merely laboring under an obliquity of vision." And again: "The law is, that whether the insanity be general or partial, the degree of it must be so great as to have controlled the will of its subject and to have taken from him the freedom of moral action." Thus all the utterances of the chief justice on this subject are positive and emphatic, and allow no room for doubts, or merely negative expressions.

And if this reasoning were even less than conclusive, the safety of society would turn the scale. Merely doubtful evidence of insanity would fill the land with acquitted criminals. The moment a great crime would be committed, in the same instant, indeed often before, would preparation begin to lay ground to doubt the sanity of the perpetrator. The more enormous and horrible the crime, the less credible, by reason of its enormity, would be the required proof of insanity to acquit of it. Even now the humanity of the criminal law opens many doors of escape to the criminal. Then a wider door would be opened by the doubtful proof of insanity made still more open by the timidity of jurors, their loose opinions on the subject of punishment, and their common error that the punishment is the conse-

quence of their finding of the truth of the facts, instead of the consequence of the commission of the crime itself. The danger to society from acquittals, on the ground of a doubtful insanity, demands a strict rule. It requires that the minds of the triers should be satisfied of the fact of insanity. Finally, we think this point has been actually ruled by this court in the case of *Lynch v. Commonwealth*, decided at Pittsburg, in 1873. The prisoner's second point was in these words: "That if the jury had a reasonable doubt as to the condition of the defendant's mind at the time the act was done, he is entitled to the benefit of such doubt, and they cannot convict." The court below said in answer: "The law of the state is that where the killing is admitted, and insanity or want of legal responsibility is alleged as an excuse, it is the duty of the defendant to satisfy the jury that insanity actually existed at the time of the act, and a doubt as to such insanity will not justify a jury in acquitting upon that ground." This ruling was sustained.

[Opinion by READ, C. J. See Pittsburg Legal Journal, 14, 53. The rest of the opinion is not considered important. REP.]

PEOPLE vs. OLMSTEAD.

(30 Mich., 431.)

HOMICIDE: *Manslaughter in attempting an abortion — Evidence — Expert — Dying declarations — Sustaining impeached witness — Pleading — Information.*

On the trial of a prosecution for manslaughter in attempting to procure an abortion, it is competent to prove any facts tending to show of what the deceased died.

It is not proper to admit the opinion of a witness as to what a person died of, without showing in the first place that the witness had made a sufficient examination of the deceased, and had such knowledge or experience as would qualify her to give an opinion.

On the trial of respondent for manslaughter in attempting to procure an abortion, it was held that an exclamation by the deceased the day before she died, *i. e.* "Oh, Aleck, what have we done? I shall die," was not admissible as a dying declaration.

It is not competent to sustain the credit of a witness, who has been impeached by proof that he had made different statements, of the circumstances testified to by him on the trial, by evidence of his general reputation for truth and veracity.

The respondent cannot be convicted of statutory manslaughter, in attempting to procure an abortion, on an information, charging him simply with manslaughter, which does not recite the facts which constitute the crime under the statute.

EXCEPTIONS from *Branch* Circuit.

Isaac Murston, Attorney General, for the people.

N. P. Loveridge and *L. T. N. Wilcox*, for respondent.

CAMPBELL, J. The respondent was informed against for manslaughter, in killing one Mary Bowers, whom it is averred he did "feloniously, wilfully and wickedly kill and slay, contrary to the statute in such case made and provided," etc. The information does not name the offense, nor the manner or means of its commission.

Upon the trial, the prosecution, in opening, stated that the prisoner was charged under § 7542 of the Compiled Laws, which is as follows:

"Every person who shall administer to any woman pregnant with a quick child any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter."

The preceding section makes the malicious killing of an unborn quick child manslaughter, if done by an injury to the mother which would have constituted her murder if she had died.

The succeeding section makes all unnecessary attempts to produce the miscarriage of a pregnant woman, whatever may be the result, punishable as a misdemeanor.

The distinction, therefore, is clearly taken, as depending on the intent to destroy a living unborn child and supplies a defect at the common law, whereby such attempts were not felonious, and in some cases, at least, may not have been punishable at all.

The elements of the crime, as applied to the case before us, are found in the death of the mother, produced by acts intended to destroy a quick child; that term being used in the statute for an unborn child liable to be killed by violence. The ambiguity

which, according to Mr. Bishop, seems to exist in some statutes, as to the fatal condition, is not found in our statutes, which cover the whole ground by different provisions. Comp. L., §§ 7541, 7542, 7543; Bish. Statutory Crimes, §§ 742-750, and cases cited.

The case was presented to the jury upon circumstantial evidence entirely, the cause of death being proved by medical testimony from a *post mortem* examination, and the connection of respondent with it being also inferential.

Upon the trial, one Lucy Stone was sworn as a witness, who testified to having been sent for by respondent on the day before the deceased died, to wash her and change her clothes. She testified to certain appearances upon the bed and clothing, and to a peculiar offensive odor which she said she had never noticed before at any time or place, although she had noticed something like it. This testimony was objected to, but we think it was allowable as going to show, in some degree, the condition of the deceased, and as a circumstance which was not irrelevant, and which might possibly be material with other proofs.

But without proof of any minute examination of the person of the deceased, or any facts on which she based her opinion, or of any knowledge or experience which might enable her to form an opinion, this same witness was allowed to answer the following question: "Will you state what in your opinion was the matter with Mrs. Bowers at that time?" Her reply was: "My opinion was that she had lost a child."

It is impossible to find any reason for receiving such proof. It involved an opinion which no medical man could give without a very full examination. It also undertook to show more than a mere miscarriage.

No witness, medical or otherwise, can be allowed to give testimony from his observation, concerning the nature of a person's illness or its causes, without proof both of a sufficient examination and such knowledge or experience as will qualify him to offer an opinion. This woman may or may not have possessed such knowledge as would allow her to give an opinion upon some of the medical questions involved in her answer, but she gave no proof of her knowledge, and gave no testimony upon which it could be inferred that her observation was such as would have justified any one in expressing an opinion. Whether it is within the power of medical science to determine from mere obser-

vation that there has been a miscarriage of a quick child, is a question we need not consider. It is certain that any competent physician would be very guarded in offering such an opinion. It is impossible to avoid the belief that the witness answered from her suspicions, and not from observation alone, and the question allowed to be put did not confine her to any such source of knowledge or inference. There is no occasion to review authorities upon so plain a case.

Objection was also made to the reception of testimony from Mrs. Belinda Wheeler, as to what was claimed to have been a dying declaration. This witness swore she was alone in the room with deceased the day before her death. Her account is as follows: "She was lying with her eyes shut. She did not open her eyes, and I put my hand on her wrist to see if I could feel her pulse, and then she spoke and says: 'Oh, Aleck, what have we done? I shall die.' I went away in a few minutes after that." And being further examined, she testified: "She did not open her eyes the last time I was there" (which was the time in question), or say anything else; I did not say anything." This is the whole proof, except some cross-examination about witness' statements on other occasions, bearing upon the existence of delirium.

Dying declarations, as is well settled, are neither more nor less than statements of material facts concerning the cause and circumstances of homicide, made by the victim under the solemn belief of impending death, the effect of which on the mind is regarded as equivalent to the sanction of an oath. They are substitutes for sworn testimony, and must be such narrative statements as a witness might properly give on the stand if living. See *People v. Knapp*, 26 Mich., 112, and cases cited; also *Hurd v. People*, 25 id., 405.

The so-called declaration admitted here was entirely destitute of any feature of testimony in the proper sense of the term. There is nothing to indicate that it referred to the cause of death. It was not made for the purpose of explaining any act connected with the death. It formed no part of any conversation, and was called out by no question or suggestion, and does not purport to be a narrative of anything. Neither is there anything to indicate that it was made for any purpose, or in view of any expectation of death, or that the deceased knew to whom she was

speaking, or that she meant to speak to any body. It is not even evident that she was awake or in her senses. The exclamation, if made in the manner described, is such a one as might naturally come from a person in agony, whose attention was completely distracted from the persons and things about her; and might easily have come from one quite unconscious of such matters.

It would be extremely dangerous, and contrary to every rule of evidence, to allow such an exclamation to be received as a dying declaration of facts, and to allow it to be eked out by suspicions and inferences, as was done here, so as to allow the jury to act upon it as if she had solemnly charged the respondent with being the author of her death, in the manner charged against him.

Two witnesses, Hattie Sweet and Belinda Wheeler, had been sworn for the prosecution, and evidence had been given by the defense to show that they had given different statements out of court upon material facts, and that one of them had testified differently on a former trial and examination. The court, against objection, allowed their credit to be supported by proof of general reputation for truth and veracity.

This, we think, was error. It is defended on the strength of certain intimations of Mr. Greenleaf (1 Greenl. Ev., § 469) and cases to which he refers. The origin of the doctrine, that the general good character of a witness may be shown in answer to any kind of impeachment seems to be referred to *Nes v. Clarke*, 2 Stark., 241, and to a reference in Starkie's Evidence to that case, as supporting it, and some decisions in this country appear to favor it.

But that case, if it be received as authority, decides nothing of the kind. It only holds that where a witness has been asked questions on cross-examination directly tending to discredit his character, — as, for example, whether he has been convicted of crime, or done acts which may disgrace him, — his good character may be shown to remove suspicions that might arise from that course of examination. It was not a case where a witness had been impeached by proof of contradictory statements, and there is no strong analogy between those two examples.

The question has been amply discussed in New York and Massachusetts, and settled against such a practice. The matter was

first considered, but not decided distinctly, in *People v. Rector*, 19 Wend., 596. In *People v. Hulse*, 3 Hill, 309, it was again disputed, and the doctrine settled against allowing the testimony. Bronson, J., gives some forcible reasons for that conclusion, while Cowen, J., was for receiving it, as he had intimated in *People v. Rector*. In *Starks v. People*, 5 Denio, 107, the court unanimously adhered to the ruling in *People v. Hulse*, and adopted the opinion of Judge Bronson. In 7 N. Y., 378 (*People v. Gay*), the court of appeals affirmed and approved *People v. Hulse*, and overruled the contrary opinions of Judge Cowen.

The case of *Russell v. Coffin*, 8 Pick., 143, is an early case in Massachusetts, where the question was carefully considered, and decided against receiving the sustaining testimony. Other cases are referred to by Judge Bronson to the same effect. And in *Brown v. Mooers*, 6 Gray, 451, Mr. Greenleaf's doctrine is emphatically repudiated as unfounded.

Looked at as a question of principle, it is not easy to see the propriety of permitting such proofs. It is, in effect, an attempt to impeach one witness by showing the good character of another whom he has contradicted. But, until impeached in some way, every witness has the legal presumption of good character, which would not be touched by another's character, and the rule is well settled that good reputation cannot be shown affirmatively before it is assailed by proof. If proof can be received which will allow good character to stand as a counterpoise to positive facts in one case, it would be very unjust to shut it out at any time.

The impeaching witness should be allowed to confirm his oath by it, if the impeached witness may use it against the impeacher, and the process would never come to an end.

It is not collateral, but direct, when offered upon the issue raised by an impeachment of general reputation. There the witness on one side asserts, and the opposing witness denies the same facts, and no side issues are raised. But whatever may be the likelihood that a man of good character will tell the truth, it will not turn falsehood into truth if he asserts a falsehood; and the attempt to sustain contradicted witnesses by evidence of character can only lead to endless inquiries, which are not likely to aid in getting at the facts in issue. It is far less satisfactory than the view and comparison of witnesses before the jury. It

would require every witness (as well remarked by PARKER, C. J.) to bring his compurgators to support him when he is contradicted, and indeed it would be a trial of the witnesses, and not of the action. 8 Pick., 154.

We think the rule which excludes proof of character in such cases is sound and reasonable, and we are disposed to adhere to it.

A remaining question is of some consequence. Objection was made that the information was not properly framed to support the conviction.

The information is very brief, and consists of the single statement that respondent, on a day and year, and at a place named, "one Mary A. Bowers feloniously, wilfully and wickedly did kill and slay, contrary to the statute in such case made and provided, and against the peace and dignity of the state of Michigan."

It is not claimed by any one that this would have been a good indictment at common law, not only for formal defects, but also for not indicating in any way the means or manner of causing death. But it is justified under our statute, which dispenses with allegations of these, and declares it sufficient "to charge that the defendant did kill and slay the deceased." C. L., § 7916.

Respondent claims that the constitutional right "to be informed of the nature of the accusation," involves some information concerning the case he is called on to meet, which is not given by such a general charge as is here made. And courts are certainly bound to see to it that no such right is destroyed or evaded, while they are equally bound to carry out all legislative provisions tending to simplify practice, so far as they do not destroy rights.

The discussions on this subject sometimes lose sight of the principle that the rules requiring information to be given of the nature of the accusation are made on the theory that an innocent man may be indicted, as well as a guilty one, and that an innocent man will not be able to prepare for trial without knowing what he is to meet on trial. And the law not only presumes innocence, but it would be gross injustice unless it framed rules to protect the innocent.

The evils to be removed by the various acts concerning indictments consisted in redundant verbiage, and in minute charges which were not required to be proven as alleged. It was mainly, no doubt, to remove the necessity of averring what need not be

proved as alleged, and therefore gave no information to the prisoner, that the forms were simplified. And these difficulties were chiefly confined to common law offenses. Statutory offenses were always required to be set out with all the statutory elements. *Koster v. People*, 8 Mich., 431. The statute designed to simplify indictments for statutory crimes, which is in force in this state, and is a part of the same act before quoted, reaches that result by declaring that an indictment describing an offense in the words of the statute creating it shall be maintained after verdict. C. L. § 7928. But both of these sections must be read in the light of the rest of the same statute, which plainly confines the omission of descriptive averments to cases where it will do no prejudice. And so it was held in *Enders v. People*, 20 Mich., 233, that nothing could be omitted by virtue of this statute, which was essential to the description of an offense.

Manslaughter, at common law, very generally consisted of acts of violence of such a nature that indictment for murder and manslaughter were interchangeable, by the omission or retention of the allegation of malice, and of the technical names of the offenses. In a vast majority of cases, a very simple allegation would be enough for the protection of the prisoner.

But where the offense of manslaughter was involuntary homicide, and involved no assault, but arose out of some negligence or fault from which death was a consequential result, and sometimes not a speedy one, the ordinary forms were deficient, and the indictment had to be framed upon the peculiar facts, and could convey no adequate information without this. See 2 Bish. Cr. Proceed., § 538.

The offense for which the respondent in this case was put on trial originated in the statute defining it, and could not have come within any of the descriptions of manslaughter at common law. An innocent person, charged under the information, could form no idea whatever, from it, of the case likely to be set up against him. He might, perhaps, be fairly assumed bound to prepare himself to meet a charge of manslaughter by direct violence or assault. But which one was meant, out of the multitudinous forms of indirect and consequential homicide that might occur after a delay of any time, not exceeding a year, from an original wrong or neglect, and of which he might or might not have been informed, he could not readily conjecture.

Nothing could inform him of this statutory charge, except allegations conforming to the statute. These, we think, he was entitled to have spread out upon the accusation. Without them, he was liable to be surprised at the trial, and could not be expected to prepare for it.

We are not prepared to hold this information bad upon its face, for we are disposed to think, and it was practically admitted on the argument, that it may apply to the ordinary homicides by assault. It was not, therefore, until the evidence came in, that it was made certain the case was different. The question of sufficiency does not arise directly upon the record, but on the bill of exceptions, and the error was in permitting a conviction on it.

The other questions are closely connected with this, and need not be considered further.

It must be certified to the court below that the verdict should be set aside, and that no further proceedings on this charge should be had under this information as it stands.

The other justices concurred.

NOTE.—In *People v. Davis*, 56 N. Y., 95, which was a prosecution for advising and procuring a woman to submit to the use of an instrument, and to take drugs and medicines for the purpose of procuring a miscarriage, and thereby causing the death of mother and child, it was held that the woman's dying declarations were not admissible against the respondent, because the death of the woman was not the subject of the charge, such death being merely an aggravation of the real charge, which was the persuading her to submit to and take measures to procure the miscarriage.

LEIBER vs. COMMONWEALTH.

(9 Bush, Ky., 11.)

HOMICIDE: *Dying declarations — Erroneous charge.*

On a trial for murder, dying declarations of the deceased should be restricted to the act of killing and the circumstances immediately attending it, and forming part of the *res geste*, and it is error to allow them to be given in evidence as to distinct transactions from which the jury may infer malice on the part of the respondent toward the deceased.

On a trial for murder, a charge that "if the jury find that the respondent struck the deceased with a piece of wood, which was likely to produce death when used as he did use it, and that deceased died, etc.," is erroneous in assuming as a fact that respondent used the piece of wood in a manner calculated to produce death.

HARDIN, J. This appeal is prosecuted for the reversal of a judgment and sentence of death, rendered upon a verdict convicting the appellant on an indictment for the murder of Charles Goennewein.

In the argument for the appellant, the correctness of the action of the circuit court is questioned, both as to its rulings in relation to the admissibility of evidence, and upon various propositions to instruct the jury. The first question thus presented for the determination of this court, and, as we conceive, the most important one which it will be necessary to decide, is, as to the competency of certain statements which were made by Goennewein shortly before his death, and which were proved and admitted as evidence, notwithstanding the objections of the defendant, as the dying declarations of the deceased, to be considered by the jury together with other evidence conducing to sustain the charge in the indictment. Those declarations not only conduced to identify the defendant as the perpetrator of the alleged homicide, and to establish and explain the circumstances of the *res gestæ*, but also purported to disclose former and distinct transactions not relating to the particular facts constituting the subject matter of the charge, or the identification of the defendant, but from which the jury might have inferred the existence of malice on the part of the appellant towards the deceased. And the essential inquiry involved, and on which the correctness of the ruling of the court under consideration seems solely to depend is, whether the court did not err in admitting so much of the dying statements of the deceased as did not relate to, and were not necessary to establish the circumstances or direct transactions from which his death resulted, and to identify and connect the defendant with them.

On this question there is some contrariety of adjudication; but the decided weight of authority on the subject seems to be to the effect that it is a general rule that dying declarations, although made with a full consciousness of approaching death, are only admissible in evidence where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the dying declarations. 1 Whart. Am. Crim. L., sec. 675; 2 Russell on Crimes, p. 761; Rosc. Crim. Ev., p. 23; 1 Greenl. Ev., sec. 156; *Nelson v. The State*, 7 Humph., 542; *State v. Sheton*, Jones' Law, N. C., 360.

The admission of dying declarations as evidence being in derogation of the general rule, which subjects the testimony of witnesses as ordinarily received to the two important "tests of truth," an oath and a cross-examination, it is obvious that such evidence should be admitted only upon grounds of necessity and public policy, and should be restricted to the act of killing and the circumstances immediately attending it, and forming a part of the *res gestæ*.

It results that in our opinion the court erred to the prejudice of the appellant, in admitting a part of the dying statements of Goennewein, however competent the residue may have been, and for that cause, if for no other, the judgment should be reversed. With reference to the action and decision of the court upon the motions to instruct the jury, we deem it sufficient to say that while we perceive but little if any ground for complaint as to most of them, the sixth instruction which the court gave is objectionable, in that it assumes as a fact that the appellant used the instrument with which he was charged to have slain Goennewein in a manner calculated to produce death. We would suggest, moreover, that we regard the instructions given, when considered together, as somewhat too numerous and prolix for a perspicuous presentation of the law of the case.

Wherefore the judgment is reversed, and the cause remanded for a new trial, on principles not inconsistent with this opinion.

NOTE. — That part of the sixth instruction, which the court held to be erroneous, reads as follows: "If the jury believe, from the evidence, to the exclusion of a reasonable doubt, that the accused, not in his apparently necessary defense, but of his malice aforethought, and without considerable provocation given at the time he assaulted and struck the deceased with a piece of wood, which was likely to produce death when used as he did use it," etc.

UDDERZOOK vs. COMMONWEALTH.

(76 Pa. St., 340.)

HOMICIDE: *Photography — Evidence — Practice.*

On a trial for homicide, a photograph, clearly proven to be a photograph of the deceased, was shown to a witness, who testified, under objection, that it resembled the body found supposed to be that of the deceased. No evi-

dence was given that the photograph was a good picture, or as to its resemblance to the deceased. The evidence was held properly admitted.

Courts will take judicial cognizance that photography produces correct likenesses, the production of the photograph being governed by the operation of natural laws.

For the purpose of identifying deceased with one, who at one time went under a different name, it is proper to prove that both were in the habit of becoming intoxicated. Personal habits are means of identification.

There is no error in allowing a jury to take documents to the jury room, where they have been admitted in evidence and exhibited to the jury during the trial.

AGNEW, C. J. This is, indeed, a strange case, a combination by two to cheat insurance companies, and a murder of one by the other to reap the fruit of the fraud. Winfield Scott Goss, an inhabitant of Baltimore, had insured his life to the amount of \$25,000. He was last seen at his shop, on the York road, a short distance from Baltimore, on the evening of the 2d of February, 1872, in company with William E. Udderzook, his brother-in-law, the prisoner, and a young man living near. They left him to go to the house of the young man's father.

In a short time the shop was discovered to be on fire. After it had burned down, a body was drawn out of the fire, supposed to be that of Goss. Claims were made upon the insurance companies, the prisoner being active in prosecuting them. On the 30th of June, 1873, the prisoner and a stranger, a man identified as Alexander C. Wilson, appeared at Jennerville, in Chester county, this state, and remained over night and the next day. In the evening, July 1st, the prisoner and the stranger left Jennerville together in a buggy. Next day, on being met and asked what had become of his companion, the prisoner said he had left him at Parkersburg. On the 11th of July, the body of a man, identified on the trial as W. S. Goss, or A. C. Wilson, was found in Baer's woods, about ten miles from Jennerville, the head and trunk buried in a shallow hole in one place, and the arms and legs in another. The stranger, who was with the prisoner at Jennerville, identified as A. C. Wilson, was traced from place to place, living in retirement, from June 22, 1872, until within a day or two of the time when he appeared with the prisoner at Jennerville. During this interval this prisoner and Wilson were seen together several times, under circumstances indicating great intimacy and privacy. Wilson has not been seen or heard of

since the evening of July 1st, 1873, when he left Jennerville in company with the prisoner. The great question in the case was, the identity of A. C. Wilson as W. S. Goss. This was established by a variety of circumstances and many witnesses, leaving no doubt that Goss and Wilson were the same person, and that the body found in Baer's woods was that of Goss.

All the bills of exceptions, except one, relate to this question of identity, the most material being those relating to the use of a photograph of Goss. This photograph, taken in Baltimore on the same plate with a gentleman named Langley, was clearly proved by him, and also by the artist who took it. Many objections were made to the use of this photograph, the chief being to the admission of it to identify Wilson as Goss; the prisoner's counsel regarding this use of it as certainly incompetent. That a portrait, or a miniature, painted from life and proved to resemble the person, may be used to identify him, cannot be doubted, though, like all other evidences of identity, it is open to disproof or doubt, and must be determined by the jury. There seems to be no reason why a photograph, proved to be taken from life, and to resemble the person photographed, should not fill the same measure of evidence. It is true, the photographs we see, are not the original likenesses; their lines are not traced by the hand of the artist, nor can the artist be called to testify that he faithfully limned the portrait. They are but paper copies, taken from the original plate, called the negative, made sensitive by chemicals, and printed by the sunlight through the camera. It is the result of art, guided by certain principles of science.

In the case before us, such a photograph of the man Goss was presented to a witness who had never seen him, so far as we knew, but had seen a man known to him as Wilson. The purpose was to show that Goss and Wilson were one and the same person. It is evident that the competency of the evidence in such a case depends on the reliability of the photograph as a work of art, and this, in the case before us, in which no proof was made by experts of this reliability, must depend upon the judicial cognizance we may take of photographs as an established means of producing a correct likeness. The Daguerrean process was first given to the world in 1839. It was soon followed by photography, of which we have had nearly a generation's ex-

perience. It has become a customary and a common mode of taking and preserving views as well as the likenesses of persons, and has obtained universal assent to the correctness of its delineations. We know that its principles are derived from science; that the images on the plate, made by the rays of light through the camera, are dependent on the same general laws which produce the images of outward forms upon the retina through the lenses of the eye. The process has become one in general use, so common that we cannot refuse to take judicial cognizance of it as a proper means of producing correct likenesses.

But, happily, the proof of identity in this case is not dependent on the photograph alone. Letters from Wilson identified as the handwriting of Goss; a peculiar ring, belonging to Goss, worn upon the finger of Wilson; the recognition of Wilson, by A. C. Goss as his brother; packages addressed to A. C. Goss, and envelopes bearing the marks of the firm with which W. S. Goss had been employed, coming and going to and from Baltimore, and many other circumstances following up the man Wilson, leave no doubt of his identity as Goss independently of the photograph.

The objection to the proof of Goss' habits of intoxication is equally untenable. True, the habit is common to many, and alone, would have little weight. But habits are means of identification, though with strength in proportion to their peculiarity. The weight of the habit was a matter for the jury.

It is unnecessary to follow the bills of exceptions in detail. They all relate to facts and circumstances bearing on the question of identity. If the bills of exceptions are many, they only denote that the circumstances were numerous, and in this multiplication consists the strength of the proof.

They are the many links in a chain so long that it encircles the prisoner in a double fold. The questions put to G. P. Moore, A. H. Barnitz and A. R. Carter were unobjectionable. Whether they really could not identify the dark and swollen face of the corpse, it was not for the court to decide; its weight belonged to the jury.

There was no error in permitting the jury, after their return into the court for further instructions, to take out with them, at their own request, the letters, check, due bill and application for insurance, papers which had been proved, read in evidence and

commented on in the trial. The appearance, contents and hand-writing of these documents were no doubt important, and to be respected by the jury, who could not be expected to carry all these features in their minds. It is customary in murder cases to permit the jury to take out for their examination the clothing worn by the deceased, exhibiting its condition, the rents made in it, the instrument of death, and all things proved and given in evidence bearing on the commission of the offense.

We discern no error in this record, and therefore affirm the sentence and judgment of the court below, and order this record to be remitted for execution.

FRASER vs. STATE.

(55 Ga., 325.)

HOMICIDE: *Evidence—Motive—Admissions.*

On a prosecution for murder, evidence that the respondent's wife being dead, he cohabited illicitly with a step-daughter, and was anxious to marry her, and that deceased had taken the step-daughter to his house and refused to give her up, and that deceased had contested in a *habeas corpus* case the right of respondent to get the step-daughter and other step-children back to his house, is admissible as tending to show a motive.

On a trial for murder, any evidence which tends to show a motive is material and admissible.

On a trial of respondent for murdering a man who had broken up illicit intercourse between respondent and his step-daughter, and continued to prevent such intercourse, letters of respondent showing great anxiety to get possession of the step-daughter's person are admissible as tending to show motive.

On a trial for felony, any statements which have been made by the respondent as to any fact circumstantially material to the issue are admissible against him. Accordingly, where it was material to show that respondent had ridden very fast, it was *held* competent to prove his previous statements as to the speed of his horse.

In this case, the evidence is held sufficient to warrant the verdict of guilty.

JACKSON, J. Dr. Joseph B. Dunwoody was murdered at the door-sill of his house in Houston county, under circumstances of great atrocity. He was called out between ten and eleven o'clock at night, as if to visit a patient, and while talking to the mur-

derer about the supposed sick person, he was shot down by the false messenger. Suspicion rested upon the defendant; he was arrested, tried and found guilty, and being recommended to mercy by the jury, was sentenced to the penitentiary for life. A motion was made for a new trial on various grounds, it was overruled on all of them, and the case comes before us for review. The evidence is very voluminous; the question turns on circumstantial testimony, and without going into detail, it will be sufficient to state briefly the points made in the motion for a new trial, and the facts on which these points rest for decision.

1, 2. The defendant had step-children; his wife was dead; one of these step-children he cohabited with illicitly, and sought to marry her. They all left him, and deceased took them to his house and cared for them, and this testimony was admitted to go to the jury. We think it legal as showing motive in the defendant to kill, and coupled with an effort to get them back, and resistance on the part of deceased in a *habeas corpus* case, it is admissible to show malice, and therefore one ingredient, and the main one, of murder.

3. Letters were also introduced showing an eager desire to get possession of the step-daughter, whom he wished to marry; one to her and one to another person, one without date and the other purporting to come from Atlanta, where defendant had not been. One of the letters admitted the incestuous intercourse with the girl. These were also objected to. We think them admissible for the reasons given above.

4. The court told the jury that the state claimed that there had been a difficulty between deceased and prisoner, and that they should see about that; and this was objected to as an erroneous charge. We think the charge right. There had been difficulties about these children, especially the much injured girl, and it was proper for the jury to consider them.

5. It is also complained that the sayings of defendant about the speed of his horse were admitted to go to the jury. It was right, we think. The defendant was twelve or thirteen miles off at eight o'clock at night or after, and the speed of the horse to show that he could make the distance by a little after ten, in less than two hours, was material to the issue, and he ought to have known how swift the horse he was riding was, and his sayings are against himself.

6. The verdict, we think, is right; at all events, it was for the jury to decide on the facts. Their decision is sustained by the evidence, and is not against law. No complaint is made of the charge except upon the single point alluded to about the difficulty between deceased and defendant, and we presume the court gave the law correctly as to circumstantial evidence, and how full and clear and exclusive of other rational theories of the case, consistent with the evidence, it should be, to authorize a conviction.

Defendant said he had been to kill a man, who was not at home, the night before, and the murderer was at Dunwoody's the night before, and Dunwoody was not at home. Defendant had a double-barreled shot-gun, and rode a horse such as is described. This gun was loaded with the sort of buckshot which killed deceased, and in the door and house where the killing was done. He took ten buckshot to load it, one fell on the floor and did not go in the gun, and nine were found. One witness recognized him on the gray horse, and riding rapidly towards Dunwoody's house. Many saw him but failed to recognize his face, but the description they gave fit his appearance. He failed to account for his absence from the party at Scarborough's, from eight o'clock to nearly midnight, and to account for his having a double-barreled gun, and taking it to the party, and leaving it outside concealed; and his own statement is by no means satisfactory. He was absent from three to five hours from the party, and in his statement, said he had gone to sleep in a fence corner, after trying to see a woman of easy virtue, who was not at home, and could show by no one who told him that she was not at home. The night was very cold. On the whole, we think he got off well by the recommendation to mercy, and his consequent imprisonment for life, and we decline to interfere.

Judgment affirmed.

McCULLOCH vs. STATE.

(48 Ind., 109.)

HOMICIDE: *Corpus delicti* — *Circumstantial evidence* — *Confessions*.

On a trial for murder, it appeared that a skeleton had been found corresponding in sex, size and race with the man whom respondent was charged with killing: *Held*, that this was sufficient direct evidence of a *corpus delicti*, and sufficiently laid the foundation for proving the skeleton to be that of the murdered man by circumstantial evidence.

On a trial for murder the prosecution put on the stand a convict who had been confined in prison with the respondent. The convict testified that respondent had told him that he had killed a man whom his conversation identified as the murdered man, and that respondent was afraid he would be tried for it when he got out. *Held*, that a charge which referred to this evidence as tending to show a voluntary confession without inducement was not erroneous.

WORDEN, J. The appellant was indicted in the court below for the murder of William C. Morgan, and, upon trial, was convicted and sentenced to imprisonment for life in the state prison. His counsel have filed an able and elaborate brief, insisting that the verdict was not sustained by the evidence, and that the court erred in its charges to the jury. We have read the evidence with care, and although it is mostly circumstantial in its character, we are satisfied that it established the guilt of the appellant without any reasonable doubt.

On the 5th of May, 1865, the deceased started from Wisconsin, with a pair of horses and a covered wagon, to come to Indiana. Some one got into the wagon with him, not shown to have been the appellant; but it was shown that the deceased and the appellant had previously made an arrangement to come together. This was the last that was ever seen or heard of Morgan by his friends or relatives.

In the autumn of 1867, a human skeleton, not quite entire, of the male sex and Caucasian race, and corresponding very well in point of size with Morgan, was found in a slough or pond, not far from a highway in Benton county, Indiana.

The skull had a hole in the lower posterior part, and a cut or gash on the top, apparently made with some sharp instrument. The latter could not have been self inflicted, and was sufficient to cause death.

A chain of circumstances, proved on the trial, led to the conclusion beyond any reasonable doubt, that the skeleton was that of William C. Morgan, and that the appellant was guilty of his murder.

The circumstances are too numerous to be detailed in this opinion, and no good purpose would be subserved by setting them out. We are entirely satisfied with the conclusion arrived at by the jury upon the evidence.

The following are the charges excepted to by the defendant:

"6. To warrant a conviction in this case, you must first be satisfied beyond a reasonable doubt that the skeleton offered in evidence is the remains of a human being. When this fact is proved, then the state may prove by circumstantial evidence, that said remains are those of William C. Morgan, the man alleged to have been killed; and may also prove by the same kind of evidence that the defendant killed him. But to warrant a conviction on circumstantial evidence, it should be so strong as to exclude every reasonable hypothesis of innocence.

"7. Confessions alleged to have been made by the defendant are to be received with great caution, and are entitled to no consideration until the jury are satisfied from the evidence, beyond a reasonable doubt, that said Morgan was murdered. If the jury find that the fact of Morgan's murder is established beyond a reasonable doubt, by evidence independent of the defendant's confession, and that after his death, the defendant voluntarily, and without any inducement, confessed himself guilty of the crime, such confession, if the jury find beyond a reasonable doubt that it was made, may be considered by them as strong proof of guilt."

The counsel for the appellant insist that the sixth charge is wrong, inasmuch as by it the jury were told that if they believed that the skeleton offered in evidence was the remains of a human being, the state might prove by circumstantial evidence that it was the remains of William C. Morgan. They insist that as this was, in substance, a charge that the *corpus delicti* might be proved by circumstantial evidence, the charge was clearly wrong. They cite in support of the position taken, the case of *Ruloff v. The People*, 18 N. Y., 179.

It may be conceded, that much that is said in that case militates against the charge in question. But that case differs from

this. In that case, the defendant was charged with the murder of a child. There was no direct proof that the child was dead or had been murdered, or that her dead body had ever been found or seen by any one. The jury were asked to presume, and find from the lapse of time since the child and her mother were last seen, and from other facts and circumstances, that the child was dead, and had been murdered by the prisoner. The court *held*, that there must be direct proof of the *corpus delicti*.

Whether the court would have applied the doctrine to a case like the present is rendered quite doubtful by the closing paragraph of the opinion in the cause. "If," says the court, "what is said by these writers is to be taken as intimating their opinion that Lord Hale's rule may be departed from, I find no judicial authority warranting the departure. The rule is not founded on a denial of the force of circumstantial evidence, but in the danger of allowing any but unequivocal and certain proof that some one is dead, to be the ground on which, by the interpretation of circumstances of suspicion, an accused person is to be convicted of murder."

In the case in judgment, the skeleton supplied what it would seem the court in the New York case thought to be lacking in order to a conviction on evidence otherwise circumstantial.

In the case of the *State v. Williams*, 7 Jones, N. C., 446, it was *held*, that in a case where the supposed body of the person alleged to have been murdered had been destroyed by fire, leaving remains shown to have been human, the *corpus delicti* might be proved by circumstantial evidence. So in the case of *Stocking v. The State*, 7 Ind., 326, where the body was destroyed by fire, this court said: "The *corpus delicti* may, like any other part of the case, be proved by circumstantial evidence."

We shall not enter upon an extended examination of the authorities upon this question, but content ourselves with the citation of a few passages from elementary writers:

"The *corpus delicti*, or the fact that a murder has been committed, is so essential to be satisfactorily proved, that Lord Hale advises that no person be convicted of culpable homicide, unless the fact were proved to have been done, or at least the body found dead. Without this proof, a conviction would not be warranted, though there were evidence of conduct of the prisoner exhibiting satisfactory indications of guilt. But the fact as we have

already seen, need not be directly proved; it being sufficient if it be established by circumstances so strong and intense as to produce the full assurance of moral certainty." 3 Greenl. Ev., sec. 131.

Bishop says (1 Bish. Crim. Proc., sec. 1070), speaking of the doctrine of Lord Hale: "But this doctrine is rather one of caution and sound judgment than of absolute law, according to what appears to be the better and later English authority." Again, the same author, in the next following section, says: "If we look at this matter as one of legal principle, we can hardly fail to be convinced that, while the *corpus delicti* is a part of the case which should always receive careful attention, and no man should be convicted until it is in some way made clear that a crime has been committed, yet there can be no one kind of evidence to be always demanded in proof of this fact, any more than of any other. If the defendant should not be convicted when there has been no crime, so equally should he not be when he has not committed the crime, though somebody has; the one proposition is as important to be maintained as the other; yet neither should be put forward to exclude evidence which in reason ought to be convincing to the understanding of the jury."

We quote another paragraph from 3 Greenl. Ev., sec. 133: "But though it is necessary that the body of the deceased be satisfactorily identified, it is not necessary that this be proved by direct and positive evidence. Where only mutilated remains have been found, it ought to be clearly and satisfactorily shown that they are the remains of a human being, and of one answering to the size, age and description of the deceased; and the agency of the prisoner in their mutilation, or in producing the appearance found upon them, should be established. Identification may also be facilitated by circumstances apparent in and about the remains, such as the apparel, articles found on the person, and the contents of the stomach, connected with proof of the habits of the deceased in respect to his food, or with the circumstances immediately preceding his dissolution."

Whatever may be the law in respect to cases where no supposed remains of the person charged to have been murdered have been found, as was the case in *Ruloff v. The People, supra*, we are of opinion that the charge given, as applied to the case made

by the evidence, was not erroneous. Circumstantial evidence, as we think, was clearly competent to identify the skeleton produced as the remains of William C. Morgan, as well as to show the cause and manner of his death.

We pass to the seventh instruction. We do not understand that counsel for the appellant question the correctness of this instruction as an abstract proposition; but they insist that there was no evidence given to which such charge could be applied, and therefore that it was erroneous. They claim that the appellant made no deliberate confessions of his guilt, and that the charge was calculated to do him harm, by impressing the jury with the idea that what he did say amounted to such confession. The evidence in respect to the confessions of the appellant, as it appears in the bill of exceptions, is as follows:

“Henry C. Warrell, a witness for the state, being duly sworn, testified as follows: ‘I am acquainted with the defendant; we roomed together in the Illinois state’s prison; I knew him in prison as James McCulloch; I saw him frequently for some three years; I saw him the spring of 1872; my memory is very poor; I am a prisoner myself; there was considerable talk in the prison about his case and mine; I was in for burglary; I heard him make remarks about being uneasy about being arrested when his time was up; I will give you the substance of it as well as I can now remember: He told me he expected to be arrested on a charge of murder; he said he had killed a man by the name of Morgan, and he was afraid the deceased man’s father would arrest him when his time expired; that the only proof that would be against him was that he was seen in company with the man, and was caught in possession of his team; I do not know that there was much more said at that time. I did not believe it, and did not pay much attention to it; I heard him make little remarks about his being uneasy about being arrested when he got out. There was a convict in prison at that time by the name of Col. Cross, a kind of a lawyer; I cannot explain every word; he went to him for information; he said they had found the skeleton that was said to be the man he murdered; he wanted to know if it would be any evidence against him, if it could not be identified. I thin Col. Cross said it would be no evidence against him; and that is all the conversation I heard, except his expression about being uneasy; he got some letters from his

wife; he said there was nothing said lately about the Morgan case.'

"On cross-examination, the witness testified as follows: 'I am a convict, and have been convicted on three different indictments for burglary; sentenced ten years; have served five years and four months of the time; I was brought here in chains; I left them off outside; the defendant told me in this same conversation, and at other times, that he wanted them to take him out and try him then, and not bother him when his time was out; in this same conversation I spoke of awhile ago, he said he was an innocent man; that he was innocent of the charge; my memory is very poor; he always said he wanted to be tried then for the charge, and not be bothered when he got out; he never said he wanted to get out and be tried after the skeleton was found.'"

The evidence, as it comes up to us, is a little obscure in this, that it does not very distinctly appear to what conversation the witness alluded as the one he spoke of "awhile ago," in which the defendant said he was an innocent man, etc. The witness had spoken of several conversations. In one of these the defendant, according to the witness, said he had killed a man by the name of Morgan, etc. Then the defendant had a conversation with Col. Cross, and took his advice. Then he said at other times that he wanted them to take him out and try him, etc. It does not appear in which of these conversations it was that he said he was innocent. It cannot be rightfully assumed that it was necessarily in the one in which he said he had killed a man by the name of Morgan.

With this evidence before the jury, we think the court was clearly justified in giving the charge in question. There is no error in the record, and the judgment below must be affirmed.

The judgment below is affirmed, with costs.

BURNS *vs.* STATE.

(49 Ala., 370.)

HOMICIDE: *Evidence—Admissions—Threats by deceased—Res gestæ—Error must be injurious.*

On a trial for murder, where the prosecution have proved statements made by the respondent immediately after the killing, tending to show that he killed the deceased, the respondent has a right to have the whole conversation, including the explanation that he then made of the fact.

But the record not disclosing what the respondent expected to prove by a witness, the court cannot reverse the judgment because the trial court excluded a legal question. For all that appears under such circumstances, the exclusion of the question may have been a benefit to the respondent. It must affirmatively appear by the record that an error complained of was injurious to the party.

On a trial for murder, where it had appeared that the deceased had gone to find the respondent, and armed himself with a revolver and a knife, saying that he intended to have a settlement with the respondent, and that when the respondent came up, the deceased spoke to him, and the two walked off together and shortly afterwards the report of a pistol was heard, but there was no evidence of the circumstances immediately preceding the killing, after the two walked away together: It was *held*, that the respondent had a right to prove that the deceased had said when starting to find him, that he was going to kill him, and used these words: "When you hear from me, you will hear that him or me is dead." Such declarations are admissible under the circumstances, as a part of the *res gestæ*.

On a trial for murder, threats made by the deceased against the respondent, which are not admissible as part of the *res gestæ*, and which were not communicated to the respondent, are inadmissible in his behalf.

Confessions deliberately made, and precisely identified, are often most satisfactory evidence; but mere verbal admissions, unsupported by other evidence, should be cautiously weighed, because of their liability to be misunderstood, the facility of fabricating them, and the difficulty of disproving them.

From the Circuit Court of *Blount*.

Tried before the Hon. WILLIAM J. HARALSON.

The prisoner in this case was indicted in September, 1870, for the murder of Pickens Musgrove; pleaded not guilty to the indictment; was tried at the March term, 1873, convicted of murder in the second degree, and sentenced to the penitentiary for ten years. On the trial, he reserved several exceptions to the rulings of the court, which are thus stated in the bill of exceptions: "The state having given evidence tending to show that at a certain time, about the 5th day of January, 1870, in said county of Blount, the deceased came to the still-house of his father, Ed-

ward Musgrove, about four o'clock in the evening, and inquired if the defendant was there, or had come yet; and being told that he had not, proceeded to load his pistol, and sharpen a knife which he had at the still-house, saying that he intended to have a settlement with the defendant; that the defendant rode up about this time, driving some of his father's hogs, got down from his horse, and was about fastening him, when the deceased went up to him, and spoke to him, and they walked off together; that they were absent some time, when a pistol shot was heard; that the defendant came up to the still-house, in from five to twenty minutes thereafter, and called for some persons there to go with him, to help take care of the deceased, whom he had shot; that two persons went with him to the place, some four hundred yards distant, where they found the deceased, wounded, and carried him to the still-house, whence he was taken to his father's house, where he died in a few days from the wound; and that the defendant, when he came to the still-house after the shot was heard, was wounded in the leg, as if with a sharp knife, and had some scratches on his throat. The defendant, by his attorneys, asked said witness, Henry Brasseal, who stated the above, if the defendant, when he came to the still-house for help, stated anything else than what is above set forth, to wit: "that he wanted them to go with him, to help take care of the deceased, whom he had shot?" The witness replied, that he did say something else at the time. The defendant then asked said witness to state all that he (defendant) said at that time. The state's attorney objected to the witness answering this question, and the court sustained the objection; to which the defendant, by his counsel, excepted.

"During the further progress of the cause, the defendant offered to prove, by one Cassey Speigle, who was staying at the house of said Edward Musgrove in January, 1870, where the deceased also lived at that time, that she was present when the deceased started to the still-house on the evening he was shot; and that he told her, when starting, that he intended to kill the defendant, and said, 'When you hear from me, you will hear that him or me is dead.' The solicitor for the state objected to the admission of this evidence, and the court sustained the objection, because the same had not been communicated to the defendant; to which ruling the defendant excepted.

"In the further progress of the cause, the defendant offered to prove, that when he came to the still-house to obtain help for the deceased, and told the witness that he had shot him, he also said, 'and I fear I have killed him. I would not have done it for the world, but he was trying to kill me, and I couldn't help shooting him.' To this the solicitor for the state objected, and the court sustained the objection, to which the defendant excepted.

"In the further progress of the cause, the defendant offered to prove by Nancy Dutton and Taylor Dutton that the deceased, the day before he was shot, came to their house in the morning, on his way to Blountsville, and in the night, on his return home, and on both occasions inquired if they had seen the defendant pass that day, or knew where he was, and stated his intention to kill him. The state objected to the admission of this evidence, and the court sustained the objection, because the same had not been communicated to the defendant; to which ruling the defendant excepted.

"In the further progress of the cause, the defendant offered to prove by one Calvin Hudson, that on the day before, or at most a very few days before, the deceased was shot, he had a conversation with him in Blountsville, in which the deceased wanted to borrow his pistol, and [said] that he wanted to make a certain man take back something he had said; and that he (witness) understood that the defendant was the 'certain man' mentioned. To which the solicitor for the state objected, and the court sustained the objection, on the ground that the same had not been communicated to the defendant; to which ruling the defendant excepted.

"In the further progress of the cause, the state having introduced certain testimony tending to prove confessions, or admissions of guilt made by the defendant, the court was requested to charge the jury, in writing, as follows: 'Admissions are a species of evidence which, from the ease with which they can be fabricated, and the liability to misapprehend what was said, should always be scrutinized and received with great caution by the jury.' Which charge the court refused to give, and the defendant excepted.

"The defendant also requested the court, in writing, to charge the jury as follows: 'That although they may be satisfied, from

the evidence, that the previous general character of the witness Johnson, for truth and veracity, was good; yet if they believe, from the evidence, that said witness has made different or contradictory statements of the circumstances attending the alleged confession, they may look to these contradictory statements to ascertain whether or not, and if so, how much, credit should be given to the testimony.' The court refused to give this charge, and the defendant excepted.

"The defendant also asked the court to give the following charge, which was in writing: 'The defendant's guilt must be made out by evidence of a conclusive nature and tendency, and must exclude any reasonable supposition of innocence.' The court refused to give this charge, and the defendant excepted to this refusal."

Hamill, Palmer & Dickinson, for the prisoner.

Ben. Gardner, Attorney General, for the state.

BRICKELL, J. The general rule, often announced by the court, is, that a party to a proceeding, civil or criminal, taking a bill of exceptions, must affirmatively show error to his prejudice, or the proceedings will not be disturbed. *Eskridge v. The State*, 25 Ala., 30; *Butler v. The State*, 22 id., 43. In this case, the state having given in evidence the declarations of the prisoner on his return to the still-house after the shooting, it was his clear right to adduce the whole of what he said at that time, in reference to the unfortunate transaction. 1 Greenl. Ev., § 218. This rule has been announced by this court so often, and it is so clearly expressed in the text-books, that we are not ready to presume any court has infringed it. The bill of exceptions does not inform us what the prisoner said at the same time, and in the same connection, which the court declined to permit him to give in evidence. Though it may have been part of the same conversation of which the state gave evidence, we cannot say that it had any reference to the killing, or to the circumstances attending the killing; nor can we say that its exclusion did not benefit, rather than prejudice the prisoner. An exception to the admission or rejection of evidence should always disclose the evidence admitted or rejected, or a revising court cannot intelligibly pass judgment on it.

2. The prisoner offered to prove exculpatory declarations made

by him when he returned to the still-house after the shooting, which the court excluded. The bill of exceptions does not inform us whether these declarations formed part of the conversation of which the state gave evidence, or whether they were made in another and subsequent conversation. Of course, we cannot say that the court erred in rejecting them. It may be proper for us to repeat the rule by which the court should be governed in determining the admissibility of this evidence. The prisoner cannot give in evidence his own declarations, unless they form part of the *res gestæ*; but if the state give evidence of his confessions, declarations, or admissions, it is his right to lay before the jury all that he said at the time, referring to the killing, and the circumstances attending it. It is the province of the jury to determine the credibility and weight of the declaration or confession. The jury must weigh the whole, rejecting no part unless for some sufficient reason; but they may, in the exercise of their judgment, give more credence to one part than to another, or may deny credence to a part or to the whole. *Williams v. The State*, 39 Ala., 532; *Chambers v. The State*, 26 id., 59; 1 Greenl. Ev., § 218.

3. It appears from the evidence set out in the bill of exceptions, that the killing was at or near a still-house. That the deceased reached the still-house before the prisoner, and on reaching the house, inquired for the prisoner; that, being informed the prisoner was not there, he obtained a knife, and sharpened it, and loaded his pistol, declaring that when the prisoner came, "he intended to have a settlement with him;" that the prisoner rode up about this time, and while he was fastening his horse, the deceased spoke to him, and they walked off together; that the report of a pistol was heard in a short time, and the prisoner returned to the still-house alone, having a wound in his leg, apparently made by a knife, and some scratches on his throat. There was no evidence, so far as disclosed by the bill of exceptions, of the circumstances of the killing, or of the conduct or condition of the parties at the time of the killing.

The prisoner offered to prove that the deceased, when starting to the still-house, said that he intended to kill the prisoner, and used these words: "When you hear from me, you will hear that him or me is dead." The state objected to the admission of this evidence, and the court sustained the objection, because it did

not appear that these declarations or threats had been communicated to the prisoner.

The general rule is, that threats of personal violence made by the deceased against the prisoner, and not communicated, are not admissible in evidence, unless they form part of the *res gestæ*. *Powell v. The State*, 19 Ala., 577; *Carroll v. The State*, 23 id., 28; *Dupree v. The State*, 33 id., 380. It is impossible to define accurately the declarations which should be treated as parts of the *res gestæ*. The main facts in this case are the killing, and the circumstances attending it. Declarations coincident with these in point of time, whether made by the deceased or by the accused, would certainly be admissible. It is not the point of time at which the declarations were made, so much as their connection with the main fact, that determines the question of admissibility. *Goudy v. Humphries*, 35 Ala., 617. If they are cotemporaneous with the main fact, connected with it, and elucidate it, or the state of the party's mind, when that is material, at the time of the happening of the main fact, they are admissible. Their weight as evidence must be determined by the jury. They are not admissible to palliate or excuse a murder or a killing, shown by other evidence to be felonious. They are admissible only to show the mental *status* of the deceased, and his motive in going to the still-house and in inviting an interview with the prisoner. If there is no evidence of the facts attending the killing, this evidence may enable the jury to determine who was the aggressor, and may properly generate a doubt of the guilt of the accused. *Campbell v. The State*, 16 Ill., 18; *People v. Scoggins*, 37 Cal., 677. It should have been admitted, and the jury permitted, under proper instructions, to determine its value. Such evidence is of little value, if it is admissible, when the prisoner has provoked the affray, or when it affirmatively appears that the deceased was not in a condition to execute his threat or was making no effort to do so. *Carroll v. The State*, 23 Ala., 28.

The declarations or threats made by the deceased to Hudson and others, were properly rejected. They do not form part of the *res gestæ*, and are not cotemporaneous with it. The threats made to Cassey Speigle, as we construe the bill of exceptions, were made when the deceased was starting to the still-house, on the afternoon of the killing, and were admissible under the facts recited in the bill of exceptions, on the same reasoning on which

the declaration of a party leaving home, as to his destination and the objects he has in view, are received. *Pitts v. Burroughs*, 6 Ala., 733.

4. The charge requested, as to the weight or value of admissions or confessions as evidence, is abstract, so far as the bill of exceptions discloses. It does not appear that any admission or confession of the prisoner was given in evidence, and the court might well have refused, on this ground, to give the charge. The rule settled by this court is, that admissions made by a party to a civil proceeding (and confessions in a criminal case, as far as their weight as evidence is concerned, stand on the same footing) deliberately made and precisely identified, are often most satisfactory evidence; but that evidence of mere verbal admissions, unsupported by any other evidence, should always be cautiously weighed, because of their liability to be misunderstood, the facility of fabricating them, and the difficulty of disproving them. *Wittick v. Keiffer*, 31 Ala., 199; *Garrett v. Garrett.*, 29 id., 439.

The bill of exceptions does not disclose what was the evidence of the witness Johnson, nor that there was any evidence he had made contradictory statements, or statements variant from the evidence he gave. The charge asked was not warranted by any fact disclosed in the bill of exceptions; and for this, if for no other reason, it was properly refused. The other charges requested were so framed as to have a tendency to mislead the jury, and were properly refused. The charges given were not excepted to, and are not subject to revision. For the error we have noticed, the judgment is reversed, and the cause remanded. The prisoner will remain in custody until discharged by due course of law.

HORBACH vs. STATE.

(43 Tex., 242.)

HOMICIDE: *Evidence of character of deceased — Practice — Right of peremptory challenge — When to be exercised.*

On a trial for felonious homicide, where the defense is that the killing was done in self defense, it is competent to prove the general character of the deceased for violence, and his habit of carrying arms, where such evidence will tend to explain the actions or conduct of the deceased at the time of the killing, and the intent of the respondent.

On a trial for felonious homicide, evidence of the general reputation of the deceased for violence, or of his habit of carrying dangerous weapons, is not admissible until some acts or conduct on the part of the deceased at the time of the killing have been proved, which such evidence will tend to illustrate or explain.

Where there was evidence that at the time of the killing, the deceased grossly insulted the respondent a number of times without any provocation, and that when respondent asked him what he meant, he put his hand behind him as if to draw a pistol, when respondent shot him, it was *held* admissible to prove the general character of the deceased for violence, and that he was in the habit of carrying weapons.

Under the statute in Texas, after a juror has been accepted and impaneled, the right of peremptory challenge is gone.

ROBERTS, C. J. The defendant was indicted for the murder of H. K. Thomas, found guilty of murder in the second degree, and his punishment assessed at six years in the state penitentiary.

The facts necessary to be mentioned to present the errors, on the trial complained of, were, that Horbach and Thomas were perfectly friendly up to the time of the difficulty, which happened about eleven o'clock at night, in a "sample room" in the city of Dallas, where and when there were present Boyle, one of the proprietors, and Duckworth, the bar-keeper, both of whom were behind the counter; Shock and Wilson, who were outside of the counter, as were also Horbach and Thomas, both of whom were somewhat intoxicated, and had taken, together with others, two drinks of spirits not long before the difficulty arose. Four of them had just played a game of pool, in which Thomas had lost, and treated the others. Upon asking his bill of the bar-keeper, he was told that he owed for two rounds of drinks, Horbach being then at the front of the store. Thomas said he owed no such damned thing. The bar-keeper said, "all right, Harvey," and Thomas paid for one round of drinks, and said if any one said he owed for two rounds, he was a damned liar. The defendant then came in singing and dancing, with a watering-pot in his hand, and put it on the counter, when Thomas asked him if he (Thomas) owed for two rounds; and Horbach said, "Yes." Thomas said, "It is a God damned lie," and taking the watering-pot, threw it down violently and mashed it. Up to this point there is no material difference in the testimony of the witnesses, but as to the balance there were some differences, which are attributable, partly at least, to two being behind the counter and

two being in front of the counter. That of the two in front, Shock and Wilson, was most favorable to the defendant, and was in substance, that Thomas told Horbach that "he was a damned lying son of a bitch," when Shock stepped up and told him that he (Shock) owed for the drinks. Thomas replied, "that is too thin," and told him to go away; and turning to the defendant told him again, whoever says that he owed for two rounds is a damned lying son a bitch, at the same time gesticulating violently with his right hand, touching or striking Horbach on the breast. Horbach said, "then you don't owe it?" Thomas again said to Horbach, "you are a damned lying son of a bitch," still gesticulating as before, in a violent, angry manner. Horbach said, "what do you mean?" perhaps twice. Thomas still repeating his accusations and gesticulations, when finally stepping back his right foot, threw his right hand behind him, pushing back the skirt of his coat (one of the witnesses says as if to draw a pistol), when instantly Horbach presented his pistol with both of his hands, and firing, shot Thomas in the head and killed him. Shock says that, being behind Thomas, he was shaking his head at Horbach; Wilson says that, during the altercation, he went into the front room, turned down some lights, came back, put some money in the safe, went behind the bar, and was talking to the bar-keeper about closing up, when the firing took place at the south end of the counter, the said witness being at the north end, and the counter being so high that he could not see the movement of the parties' hands in front of it. Shock went for a doctor. Wilson left the house, as did defendant, who was arrested that night in Wilson's room. There was evidence that Bogle and Duckworth were more friendly to Thomas than to Horbach. The doctor came and found no weapons on Thomas, and there was no further evidence as to whether he had weapons or not when he was shot.

There is no intention here to give the least intimation of opinion as to the weight of this evidence, as establishing one conclusion or another in reference to the guilt or innocence of the defendant. It is collated simply to show that there was evidence tending to prove one of two conclusions leading to different results, either that Horbach shot Thomas from a sudden motive of revenge for an unprovoked and gross insult, or under the belief that the gross insult was then being followed up by the act

of making a deadly assault upon him with a weapon, endangering his life. The facts tending to the establishment of the latter conclusion (to what extent, it is immaterial to consider now) were, that Thomas, having a dispute with the bar-keeper about his liquor bill, became angry, and without any apparent cause, turned the controversy about it from the bar-keeper to Horbach. The bar-keeper, Shock, and Horbach, all tried to pacify him, and let him have his own version of the matter. Still he persisted in fastening the controversy on Horbach, who was not concerned in it and was not even present when it commenced. Horbach treated the matter lightly at first, and when all the means that were tried could not divert him from making the issue with Horbach, he commenced treating the matter seriously, and asked Thomas what he meant. Thomas stepped back his right foot, and threw his hand behind him as if to draw a pistol. It may be a significant fact, as tending to show the known character of Thomas, that the persons there, seeing the matter becoming serious, did not interfere, except that Shock, having been once rudely repulsed by Thomas, stood off at some distance shaking his head at Horbach. This may bear two constructions, either that they did not think it necessary to interfere, or that they did not think it consistent with their own safety to interfere with Thomas any further than had been done.

For the purpose of adding still further weight to the evidence, tending to the conclusion that Horbach acted under the belief, and had reasonable grounds, from the words and acts of Thomas then said and done, to believe that Thomas was in the act of making a deadly assault upon him with a weapon, the defendant, by his counsel, sought to prove by questions to witnesses, that Thomas was in the habit of carrying deadly weapons, and that Thomas, when intoxicated, was a quarrelsome and dangerous man. The questions, being objected to, were not allowed to be answered, to which rulings of the court defendant excepted, which appears in bills of exceptions in the record.

The question is, Was such evidence admissible for such a purpose as an element of defense?

—"Evidence, in legal acceptance, includes all the means by which an alleged matter of fact, the truth of which is submitted to investigation, is established or disproved.

"By competent evidence is meant that which the very nature

of the thing to be proved requires as the fit and appropriate proof in the particular case."

The thing sought to be proved in this case is, that Horbach had reasonable grounds to believe, and did believe, that Thomas then intended and was in the act of then attempting to kill him, by the use of a weapon. Now, supposing it to be proved that Thomas, being enraged and pressing the unprovoked quarrel upon Horbach until it became serious, and had arrived at a point where Thomas would either have to recede or follow it up with increased malignity, and just at that juncture he steps back and throws his right hand behind him, what other facts would be required as peculiarly fit and proper to be known by Horbach to induce that reasonable belief? Certainly the most fit and appropriate additional facts that he could possibly know, tending to prove such reasonable belief, would be, that Thomas had a pistol on his person back where he put his hand, and that he was a man that would use it when mad and intoxicated, and would not likely back down from a difficulty that he had himself provoked. If Thomas was in the habit of carrying a pistol where he put his hand, it was not improbable that his friend Horbach, as well as others, knew it, and might infer from the motion of his hand the intention to draw it; and if his general character was that of a dangerous man when aroused with anger and excited with drink, Horbach might infer that Thomas intended to use the pistol on him when drawn. On the other hand, if Horbach knew that Thomas' general character was that of a quarrelsome man, with no force of character, not vicious and destructive in his nature, not likely to use weapons if he had them, and not in the habit of carrying them, then the inference might not be reasonable from his conduct that he intended then to draw and use a pistol.

Thus is it shown that these very facts, Thomas' character for violence and habit of carrying arms, with Horbach's knowledge of them, might determine his guilt or innocence in acting as promptly as he did. His intoxication, his anger, his persistently pressing the difficulty on Horbach without cause, his violent character, and his habit of carrying weapons, would all be appropriate and fit facts, if they existed, to throw light upon and give significance to his movement in stepping back and throwing back his hand. Taken separately and in the abstract, they

may be meaningless, indifferent and immaterial, but taken together, they may be pregnant with meaning, as shown by the conduct of the two witnesses, Wilson and Shock, who saw Thomas' motion of his body and of his hand. A man's character for violence, dependent upon his irascible temper, overbearing disposition, and reckless disregard of human life, is as much a part of himself as his judgment and discretion, his sight or hearing, his strength, his size, his activity, or his age, any one of which may become a material fact to give a correct understanding of his conduct and the intention with which an act is done by him, and are therefore part of the *res gestæ* when pertinent to the act sought to be explained. Their office in evidence is adjective, as auxiliary to a substantive fact to which they are pertinent, and without which they are irrelevant and immaterial. They are helps to the understanding in construing human conduct. The mind cannot reject or disregard them. They, and all like helps, ever have been, and ever will be, elements in the formation of belief as to what a man designs by an act to which they are pertinent. Practically we know that men generally, who are assailed with violence, act in defending themselves with promptness and force in proportion to the violent and desperate character of their assailant. It behooves them so to do for their own safety, because it is known that such men who usually fight only with weapons, and usually have them ready for use, are not to be trusted to get an advantage in the combat.

If, then, the character of the assailant in any case has helped to form a reasonable belief in the mind of the assailed that his life was then in danger, when the acts alone would fail to do it, the jury should in some way be informed of the character of the assailant, as well as of his acts, to enable them to understand that the belief was a reasonable one. Otherwise he might act in his defense on such reasonable belief, and the jury, not helped by a knowledge of the assailant's character to understand the import of his acts, of which they were informed, would find him guilty of murder, because of his having acted without reasonable grounds for believing that his life was then in danger, when in fact he had such reasonable grounds of belief, did believe it, and acted on such belief.

This being sometimes an important fact, necessary to be known

by a jury to enable them to come to a proper conclusion as to the state of mind of the accused just at the time when he killed the deceased, how and under what circumstances is it admissible in evidence? It is laid down as the rule at common law, as practiced in England and most of the older states of the American Union, that it must be made to appear, if at all, in the transactions immediately connected with the killing as part of the *res gestæ*, as it is termed, and to be deduced therefrom rather than to be proved as a distinct fact.

In an old settled country, where there is little change of population, this fact would generally be known to a jury without being proved as a distinct fact, whereas in newly settled countries, it might not be. Formerly it was the rule to get jurors from the vicinage who knew the parties and the transaction. Now, the very opposite is the rule. There are various other reasons arising out of the state of society and habits of the people in different countries and at different periods, which would make it important that this fact, when pertinent, should be made to appear as a distinct fact, as explanatory of the acts and intentions of the parties concerned, in order to arrive at the truth. In an early case in North Carolina, it was said, in speaking of the common law (in a case where it was held that the proof of the character of the deceased for violence was admissible as a distinct fact), that it is a "system which adapts itself to the habits, institutions and actual conditions of citizens, and which is not the result of the wisdom of any one man in any one age, but of the wisdom and experience of many ages of wise and discreet men." *State v. Tackett*, 1 Hawk's L. & Ch. (N. C.), 217.

In an early case in Alabama, evidence of the general character of the deceased was held to be admissible. Chief Justice Lipscomb (who so long adorned our court also as associate justice), in delivering the opinion, said in very strong language, "If the deceased was known to be quick and deadly in his revenge of insults, that he was ready to raise a deadly weapon on every slight provocation; or, in the language of counsel, his 'garments were stained with many murders,' when the slayer had been menaced by such an one, he would find some excuse in one of the strongest impulses of our nature in anticipating the purposes of his antagonist. The language of the law in such a case would be, obey that impulse to self-preservation even at the hazard of

the life of your adversary." *Quesenberry v. The State*, 3 Stew. and Port., Ala., 315-6. In the same case it is said that, "there can be no doubt but that when the killing has been under such circumstances as to create a doubt as to the character of the offense committed, that the general character of the accused may sometimes afford a clue by which the devious ways by which human action is influenced may be threaded and the truth obtained." These views of the law are quoted and adopted with numerous reasons for their correctness by Justice Lumpkin in the case of *Keener v. The State*, 18 Ga., 221; *Monroe v. The State of Georgia*, 5 id., 90.

In the case of the *State of Missouri v. Keene*, 50 Mo., 358, the court say, "where homicide is committed under such circumstances, that it is doubtful whether the act was committed maliciously, or from a well grounded apprehension of danger, it is very proper that the jury should consider the fact that the deceased was turbulent, violent, and desperate, in determining whether the accused had reasonable cause to apprehend great personal injury to himself." This was said in reversing a conviction for murder, because the court had excluded evidence offered that the deceased was a quarrelsome, dangerous, and desperate man, and in the habit of carrying weapons, as was done in this case. See also *The State v. Hicks*, 27 Mo., 590.

The same doctrine was announced in the state of Minnesota in the case of *The State v. Dumphey*, 4 Minn., 446, and also in the State of California, 10 Cal., 309, in the case of *The People v. Murray*.

In the case above quoted from Minnesota, it is said: "The character of the deceased *per se* can never be material in the trial of a party for killing, because it is as great an offense to kill a bad man as it is to kill a good man, or to kill a quarrelsome and brutal man as it is to kill a mild and inoffensive man.

The principle upon which this testimony is alone admitted arises from some peculiar condition in which the facts of the killing leave the crime. If the facts as established free the case from uncertainty and doubt, and leave the killing an act of premeditated design on the part of the defendant, the quarrelsome character of the deceased can in no manner change the nature of the offense; but if circumstances surround the transaction which leave the intention of the defendant in committing the crime

doubtful, or evenly balanced, or in any manner indicate provocation on the part of the deceased, testimony of the quarrelsome character of the deceased would then become sufficiently part of the *res gestæ* to be admitted to explain or throw light upon the matter. *State v. Dumphrey*, 4 Minn., 445-6.

It may be deduced from these authorities that the general character of the deceased for violence may be proved when it will serve to explain the actions of the deceased at the time of the killing; that the actions which it would serve to explain must first be proved, before it would be admissible as evidence; that if no such acts were proved as it would serve to explain, its rejection, when offered in evidence, would not be error; and that, if rejected when a proper predicate has been established for its admission, it is held error. See *Irvin v. The State*, decided this term. This results in what has been previously attempted to be developed, that the general character of the accused for violence should be allowed to be proved; not as a substantive fact, in whole or in part abstractly constituting a defense, but as auxiliary to, and explanatory of, some fact or facts proved to have occurred at, and in connection with the killing, which tend to establish a defense when thereby aided by furnishing reasonable grounds for the belief on the part of the slayer that he is then in immediate and imminent danger of the loss of his life from the attack of his assailant. It is observable in most of these cases, that it is said that the evidence of character for violence is admissible in a doubtful case. It can hardly be meant by this, that it is admissible only in a doubtful case of guilt; for if that is doubtful, there is no need of proof of character or anything else to help out the defense. 1 Whart. Crim. Law, sec. 644. The explanation, it is submitted, is that the person killing is presumed to have committed murder by the act of killing, and in arraying the facts to establish that he acted in self defense, if an act of the deceased at the time of the killing is of doubtful import, or is otherwise of a character that it would be explained, and construed more favorably for the accused by adding to it the proof of character of the deceased for violence, then such proof is admissible. Whart. Crim. Law, sec. 641, and cases cited.

The same rule would apply to the proof of the deceased's habit of carrying arms when pertinent. *Id.*

It would be easy to cite authorities opposed to the admission

of such proof upon any condition or under any circumstances as part of a defense. 3 Greenl., sec. 27, and note; 1 Whart. Crim. L., sec. 641, and note.

Our Criminal Code provides for the admission of the proof of the general character of the deceased, as a violent or dangerous man, when it has been proved that he had previously made threats against the life of the defendant, which threats are declared to be admissible, but not to be regarded as affording a justification for the offense, unless it be shown that at the time of the homicide the person killed, by some act done, manifested an intention to execute the threat so made." Paschal's Dig., art. 2270.

Here the principal object is to provide for the admission of threats, and incidentally thereto is permitted the proof of the violent character of the deceased, to give force to them, and both together, when proved, serve only to explain the object of an act done by the deceased at the time of the killing.

The main object of this provision of the code was to settle a long continued controversy in the courts of this state as to whether previous threats should be admitted at all, and if admitted, what their force and effect should be; and whether or not a predicate should be first established for their admission, by the proof of some act of the deceased which they would give point to and explain.

This affirmative provision for the admission of the proof of the character of the deceased, as a dependent incident to threats that have been admitted to be proved, should not be held to operate as an exclusion of the proof of character in any and all other instances wherein it might be equally applicable and pertinent.

In providing for the admission of previous threats, it simply insured also the admission of that which was necessary to give them their proper weight and force, without prescribing anything either for or against the admission of the proof of the violent character of the deceased, in aid of any other fact besides threats.

This provision of the code, it is believed, is a reenactment of the rules relating to threats, as adopted and practiced as part of the common law in this state before the adoption of the Penal Code. *Lander v. The State*, 12 Tex., 474, 484.

If our laws sanction the proof of the violent character of the deceased in aid of threatening words, it is difficult to see why it should not be equally allowed to be proved in aid and explanation of the threatening acts done by the deceased at the time of the killing.

It is scarcely necessary to go into an explanation of the condition of things in this country, which imperatively requires the admission of the proof of the character of the deceased for violence, in order to attain the ends of justice in the administration of the criminal law. It is well and generally known that there are some violent and dangerous men in this country, who are in the habit of carrying pistols belted behind them and in their pockets, who never think of fighting in any other way than with deadly weapons, who are expert in using them, and who, especially when intoxicated, bring on and press to the extreme of outrage their deadly rencounters for causes and provocations that would be regarded as utterly trivial by peaceable men, and that if one of such persons, while engaged in an angry altercation, should suddenly step back and rapidly throw his hand behind him, it might readily be understood by those who saw it to mean, that he was in the act of drawing a pistol to use it. The same act by one of the great mass of our peaceable citizens who are not in the habit of carrying weapons would suggest no such thought, and in such case, the pistol would have to be drawn and exhibited before any such thing would be conceived, unless there had been some very extraordinary provocation.

This state of things here is a substantial reality, well known and ostensible to the perception of every one at all familiar with the subject, and men act upon it, and are compelled to act upon it, in defending themselves from deadly assaults.

It is true, the law requires a party killing to act under the responsibility to himself of acting soon enough to save himself from loss of life or from serious bodily injury, such as mayhem on the one hand, and on the other, the risk of exercising firmness and discretion to wait long enough until some act is done by the deceased, at the time of the killing, by which the jury trying the case will be satisfied, considering all the surrounding circumstances and the parties concerned, that the defendant had reasonable grounds to believe, and did then believe, that he was then in imminent and impending danger of being murdered or

mained by his assailant. Paschal's Dig., art. 2226. And, although the attack may be unlawful and violent, if the act done by the deceased indicated a "less degree of personal injury than killing and maiming," then, before the killing can be fully justified or excused, it must be shown that "all other means were resorted to for the prevention of the injury, and the killing must take place while the person killed is in the very act of making such unlawful and violent attack." Paschal's Dig., art. 2228. This distinction and difference in the rule as made by our code, depending upon the degree of injury intended by the deceased as manifested by his acts, is very important, practically to be observed.

It may avoid repetition by noticing here that this distinction was not properly observed in the otherwise very excellent charge of the court below, which is as follows: "The defendant may also justify himself in the killing by evidence showing: 1st, that the deceased made an unlawful and violent attack upon him; 2d, that the attack so made was of such a nature as to have produced in the mind of this defendant a reasonable expectation or fear of death or some serious bodily injury; 3d, that this defendant resorted to all other means to prevent the injury; 4th, that deceased was killed while in the very act of making such unlawful and violent attack. And unless all four of these propositions affirmatively appear in evidence, the defendant cannot be justified on the ground of an unlawful and violent attack upon his person."

The second proposition above quoted is not contained in the article of the code to which the other three relate (art. 2228, Paschal's Dig). By this article, 2228, it is intended to provide the rule that where any other unlawful and violent attack is made than one in which the acts of the deceased manifest the intention to murder or maim (or to commit rape, robbery, arson, or theft at night), defendant is required to resort to all other means before killing his assailant for the prevention of the injury, because in such an attack, it is presumed that there may be time and opportunity to resort to other means. But, as provided for under the preceding article, 2226, where, at the time of the killing, "some act has been done by the deceased showing evidently an intent to commit such offense" (murder or maiming), then and there, in that event, the party thus attacked need not resort to

other means before killing his assailant, because it is presumed in such a case that the party's safety depends upon his prompt action in killing his adversary. Thus, when an unlawful and violent assault is committed, the degree and character of injury intended by the assailant, as then indicated by his acts then done, is made the test of whether the party attacked may at once kill his assailant, or must resort to all other means for the prevention of the injury before killing him. This confusion from blending the two rules might have been obviated by giving the 3d charge asked by defendant's counsel, which was refused by the court only upon the ground that it was deemed to have been "substantially given."

To return to the evidence excluded, it is proper to notice, on account of the intimate relations between threats and the general character of the deceased, that by our code threats are admissible as independent evidence, without first having established a predicate for their admission by the proof of acts done at the time of the killing, to which they might give additional force, subject to having their effect as evidence subsequently explained away and destroyed by the charge of the court in the absence of evidence tending to prove such acts.

In the case of the proof of general character of the deceased, there must be a predicate established by evidence already submitted, tending to prove threats of the deceased, or some act done by him at the time of the killing, which it would aid or give force to, as heretofore explained; and when admitted, it would be proper and not charging on the weight of evidence, for the court to explain to the jury the object of its admission as auxiliary and explanatory of the threats or acts to which it was pertinent, and to be not of itself independent evidence of a defense.

The evidence exhibiting the acts of the deceased at the time of the killing constituted a predicate for the admission of the proof of the general character of the deceased as a violent and dangerous man, and that he was in the habit of carrying weapons, and upon that ground, such proof should have been admitted.

There is also a bill of exceptions in the record, by the defendant as to the ruling of the court in the selection of the jury, which recites the facts as follows:

"After the state had passed severally upon Mitch. Gray, R. H. Lindsey and James H. Davis, and before the jury had fully been made up, the court permitted the district attorney to challenge each of said jurors peremptorily, and had them stand aside, to which defendant excepts." The ruling of the court was, that the state or defendant could challenge any juror, although accepted, when a new juror was chosen, until their challenges respectively were exhausted.

Upon the trial of a capital offense, a special *venire facias* is issued for persons, not less than thirty-six nor more than sixty, for the purpose of forming a jury. Pasch. Dig., art. 3016, and following.

It is further provided that, "in forming the jury, the names of the persons summoned shall be called in the order they stand upon the list, and, if present, shall be tried as to their qualifications, and unless challenged, shall be impaneled." Pasch. Dig., art. 3024. By this we understand that they are to be challenged, either for cause or peremptorily, severally, as each one is determined by the court to be a qualified juror, which is to be continued, one by one, until the jury is fully formed to the number of twelve. We know of no law or established practice under the law, which sanctions the peremptory challenge of a juror by either party when thus placed on the jury, whether it is full or not. There may be discretion in the court for excusing or standing aside a juror after he is thus selected, for some good cause shown at the time why the juror cannot or ought not to serve on that jury. We do not think, therefore, that the mode of selecting the jury that was adopted in this case is warranted by any law of this state.

For the several errors that have been pointed out, and particularly for that of excluding the evidence offered to prove the general character of the deceased for violence, and that he was in the habit of carrying weapons, the judgment must be reversed and the cause remanded. *Reversed and remanded.*

NOTE.—On the trial of an indictment for homicide, evidence offered generally to prove that the deceased was well known, and understood to be a quarrelsome, riotous and savage man, is inadmissible. If the offer be general, and not connected with the defendant's *status* at the time, the testimony must necessarily be excluded, for it would be a barbarous thing to allow A. to give as a reason for his killing B., that B.'s disposition was savage and riotous. When, however, it is

shown that the defendant was under a reasonable fear of his life from the deceased, the deceased's temper, in connection with previous threats, etc., is sufficiently part of the *res gestæ* to go in evidence as explanatory of the state of defense in which the defendant placed himself." 2 Whart. Crim. Law (7th ed.), § 641.

In *State v. Bryant*, 55 Mo., 75, the evidence tended to show that the deceased, at the time he was killed, had grappled the defendant, and was trying to pull a slung shot out of his pocket. The defense offered to show that the deceased was a desperate and dangerous man, and the evidence was excluded. *Held*, error. The court say: "Whilst it is perfectly true that the character of the deceased affords no justification, and will not even palliate the crime, where it appears that the defendant was the aggressor, and provoked the altercation, still it frequently becomes of great importance in determining the degree and quality of the offense. A bad man, as well as a good one, is equally under the protection of the law, but in a case of homicide, when it is doubtful whether it was committed with malice or from a well grounded apprehension of danger, it is necessary to take into consideration the fact that the deceased was desperate, violent or dangerous. A peaceable, well disposed man, although in anger, might excite very little fear, whilst the menacing attitude of a cruel, vindictive and desperate person would cause the greatest apprehension, and justify a line of action in the one case which would be wholly unwarrantable in the other. It is therefore evident that the characteristics of the deceased, with the restrictions placed upon them by the court, did not meet the case. A man may not be peaceable, and still have nothing dangerous about him; he may be the very reverse of quiet, and yet not in any way dangerous or desperate. The very traits of character, which it was important to show as throwing light upon the character of the offense, were the very ones which the court would not permit to go to the jury.

In *Monroe v. State*, 5 Ga., 85, where it was doubtful whether the killing was malicious or in self defense, the court rejected evidence which was offered on the part of the defense, which went to show that the deceased was a violent, rash and bloody minded man, reckless of human life, in the habit of taking advantage of his adversaries in personal contests, and that the prisoner was well acquainted with his character in this particular. The rejection of the evidence was held error. The court say: "As a general rule, it is true that the slayer can derive no advantage from the character of the deceased for violence, provided the killing took place under circumstances that showed he did not believe himself in danger. Yet in cases of doubt whether the homicide was perpetrated in malice, or from a principle of self-preservation, it is proper to admit any testimony calculated to illustrate to the jury the motive by which the prisoner was actuated. 3 S. & P., 308. And in this view, we think the evidence was improperly ruled out. Reasonable fear, under our code, repels the conclusion of malice; and has not the character of the deceased for violence much to do in determining the reasonableness or unreasonableness of the fear under which the defendant claims to have acted? Does it make no difference whether my adversary be a reckless and overbearing bully, having a heart lost to all social ties and order, and fatally bent on mischief; or is a man of Quaker-like mien and deportment? One who never strikes except in self-defense, and then evincing the utmost reluctance to shed blood? We apprehend that the imminence of the danger, as well as the chance of escape, will depend greatly upon the temper and disposition of our foe. In

these cases, every individual must act upon his own judgment, and in view of his solemn responsibility to the law. If the assailant intend to commit a trespass only, to kill him is *manslaughter*; but if he design to commit a felony, the killing is *self-defense*, and justifiable. 1 Hawk. P. C., ch. 28, sec. 23; 1 East C. L., 272. Who, knowing the character of Kyd, the pirate, or of the infamous John A. Murrell, would not instantly, upon their approach armed with deadly weapons, act upon the presumption that robbery, or murder, or both, were contemplated?"

PEOPLE vs. ALIBEZ.

(49 Cal., 452.)

HOMICIDE: *Duplicity.*

On a demurrer for duplicity to an indictment for murder, containing but one count, charging the murder of three persons, it was *held* that the count was bad as charging three offenses.

The murder of three persons constitutes necessarily three offenses.

WALLACE, C. J. The indictment, containing but a single count, charges that the defendant "unlawfully, and with malice aforethought, and in and upon P. Alibez, C. Alibez and R. Alibez, did, wilfully, unlawfully, maliciously and feloniously administer a poisonous drug, known as strychnine, with intent them, the said P. Alibez, C. Alibez and R. Alibez, to unlawfully and maliciously kill and murder, and did maliciously, unlawfully and feloniously then, and there, by administering said poisonous drug, to wit, strychnine, unlawfully, premeditatedly and with malice aforethought, kill and murder the said P. Alibez, C. Alibez and R. Alibez, contrary to the form, force and effect of the statute," etc. The defendant filed a demurrer to the indictment, on the ground that it charges more than one offense; the demurrer was overruled. A trial was subsequently had upon a plea of not guilty, and a verdict of guilty of murder in the first degree having been found by the jury, the defendant moved the court in arrest of judgment, upon the ground that more than one offense had been charged in the indictment. The motion was denied, and judgment having been rendered upon the verdict, the case is brought here upon appeal.

The statute (Penal Code, 954) under which the proceedings in question were had distinctly provides, that the indictment "must charge but one offense," while it is self-evident that the

indictment here, charging the defendant, as it does, with the murder of three persons, necessarily charges three offenses. The slightest examination of the statute upon the part of the district attorney, in the first instance, would have prevented such a blunder. Even if he had overlooked it, however, at the outset, it would seem that the demurrer and motion in arrest of judgment subsequently made ought to have called it to his attention.

Judgment reversed and cause remanded, with directions to the court below to sustain the demurrer to the indictment, and to dispose of the prisoner, with a view to submitting the charge to another grand jury.

NILES, J., did not express an opinion.

NOTE.—In *Clem v. State*, 42 Ind., 420, the same question arose and was decided differently. In that case, the prisoner was indicted for murder for killing one Jacob Young, by a gunshot wound. She pleaded a former acquittal. The plea set forth that she had formerly been tried on an indictment for murder, charging the killing of Nancy Jane Young by a gunshot wound, and that she was acquitted on that trial of murder in the first degree, and convicted of murder in the second degree, and that judgment was rendered upon the verdict. The plea further set forth that the two indictments charged identically the same offense, and (inferentially) that the same act caused both deaths. To this plea the state demurred, and the demurrer was sustained and the plea overruled, to which the defendant excepted. The defendant then pleaded not guilty, and on a second trial, was convicted of murder in the second degree. The case was taken by appeal to the supreme court, where it was held that the overruling of the plea was error, and that "the killing of two or more persons by the same act constituted but one crime." In support of this proposition, the court cite *State v. Darrow*, 2 Tyler, 387, an assault and battery case; *Ben v. State*, 22 Ala., 9, a case of poisoning, and various other authorities.

SAUNDERS vs. PEOPLE.

(29 Mich., 269.)

HOUSE OF ILL FAME: *Evidence — Pleading.*

In an information for letting a house for the purposes of prostitution, the statement of the locality of the house need not be more precise than in informations for burglary or arson.

Time in an information, where it is not matter of description, need not be proved as laid.

It is error to allow a jury to infer a fact, of which there is no evidence.

In a prosecution for letting a house for the purpose of a prostitution, it is admissible to prove the reputation of the lessee, and of girls who were seen in the house.

Testimony which shows that the lessee of a house and women who had been seen in the house were reputed prostitutes is not, of itself, sufficient to establish the fact that the house is kept or used as a house of prostitution.

EXCEPTIONS from Recorder's Court of *Detroit*.

Isaac Marston, Attorney General, for the people.

Browse T. Prentis and *George H. Penniman*, for the respondent.

CAMPBELL, J. Respondent was convicted under section 7702 of the compiled laws, of letting a dwelling house, "knowing that the lessee intended to use it as a place of resort for the purpose of prostitution and lewdness." The same section contains a prohibition and penalty against knowingly permitting a lessee to use a dwelling house for such purposes, but the information was confined to the offense of letting with guilty knowledge.

The information was objected to as not describing the precise locality of the dwelling; and objection was also made to the proof of a lease dating back more than a year before the time set forth in the information.

We do not think the locality needs any more precise description under the usual practice. The name of the lessee is given. There has always been much looseness in the description of places in indictment, involving crimes connected with habitations. Indictments for burglary or arson should contain as accurate references to the place of the offense as the purposes of this statute require. But such a description as is given here would be sufficient at common law in those cases.

It was certainly a stretch of propriety to give a date of leasing so very remote from the true one. But where a date is not given as a matter of description, the practice has allowed the time to be alleged without any reference whatever to the truth. We are unable to say that the variance in the present case is such as to affect the legality of the proceedings.

The prosecution proved the lease by the lessee, Mary Lavall, who denied, however, that there was any improper use or intent. She was allowed, under objection from respondent, to state the amount of the rent. We can see no reason why any of the terms of the lease should be excluded. But in charging the

jury, the court allowed them to consider the amount of the rent as having a bearing on the likelihood of such a rate being paid, except for improper purposes. This was clearly error, as there was no proof introduced to create a standard of comparison; and it would be extremely dangerous to leave juries at liberty to derive conclusions based upon nothing but conjecture.

Objection was also made to the introduction of testimony tending to prove that Mary Lavall was a woman of ill repute, and had kept houses of ill repute, and that girls seen in the house were reputed to be prostitutes.

It is true that no one can be convicted upon evil repute, without proof of actual misconduct. Persons and houses may bear an ill name, and yet there may be nothing known against them which would justify the interference of the law. And the respondent could not be lawfully convicted on such testimony, without evidence of some act which comes within the statute.

But the fact that certain proof offered is not sufficient to make out a case is no reason why it should not be received to make out a part of it. It was necessary in this case, not only to prove the intended and actual use of the dwelling for the unlawful purpose, but to show that the respondent knew it was so intended when he first leased it. It is not likely that persons who come to an understanding on such a purpose will express it in writing, or even express it at all. Criminal agreements are often, if not usually, made tacitly. They can only be proved by circumstances. If a person leases a house to a woman of ill repute, and knows of that repute, and the house is thenceforth used for unlawful purposes, and such use is known to him, these facts must be regarded as having a tendency to create belief in his guilty knowledge, or, at all events, as bearing upon that fact. All the facts cannot be brought in at once. Each is proved separately, and the order of proof must be left somewhat discretionary. If facts enough are not shown, the respondent cannot be convicted, but no relevant fact can be excluded merely because it does not by itself prove the whole case. This testimony was all relevant, and therefore properly received.

We think, however, that an error was committed in permitting a conviction when there was no evidence of the main fact.

The attention of the court was called to the question, and the judge was asked to charge that there was no evidence that de-

fendant knew the house was resorted to, or that it was resorted to in fact, for the purpose named, but this was refused.

The testimony tended to show nothing more than the evil repute of the lessee, and of other women who had been seen in the house. There was no evidence of any acts of lewdness committed there, and no evidence that men resorted there at all. If there had been proof that the house was resorted to by men as well as women of ill fame, the jury could draw any reasonable inference from such facts. But the law does not punish the mere letting of houses to bad characters. It is the use of the house, and not merely the repute of its inmates, which the particular statute under consideration was intended to reach.

Whatever may be the probability that the house will be improperly used when in such hands, yet there must be clear proof of intent, to satisfy the law, and the fact of such use, from which in this case, the intent was sought to be derived, is not to be assumed without proof, direct or circumstantial. If the inmates commit offenses elsewhere, the landlord is not made responsible for what is not done on his premises, and the court erred in allowing the case to be disposed of without testimony tending to establish the misuse of the house.

We do not wish to be understood as holding that if there is clear proof of a letting with the distinct understanding that the house is to be used for unlawful purposes, any proof of actual use would be necessary. The crime may be complete at the time of the letting, and such is the meaning of the statute. But in the case before us, there was no proof of such design that could have sufficed without the evidence of the actual use, and therefore the evidence became essential.

Upon the other principal rulings of the court, so far as they are likely to be called for on another trial, the objections taken do not seem to be based upon any substantial variance between charges asked and given. The distinctions are over nice, and lacking in importance.

For the errors before noted, the conviction should be set aside and a new trial granted, and directions given to the court below accordingly.

COOLEY and CHRISTIANCY, JJ., concurred.

GRAVES, C. J., did not sit in this case.

SYLVESTER *vs.* STATE.

(42 Tex., 496.)

HOUSE OF ILL-FAME: *Evidence.*

Evidence of the general reputation of a house is admissible for the purpose of establishing its character as a house of prostitution.

Whether such evidence is sufficient standing alone to sustain a conviction, *quære*.

APPEAL from Criminal District Court of *Galveston* County. Tried below before the Hon. Samuel Dodge.

Mary Sylvester was indicted for keeping "a disorderly house for the purpose of public prostitution, and as a common resort for prostitutes."

On the trial, witness Drew testified that he knew the defendant, and her residence, in 1874; knew the general character and reputation of defendant to be that of keeping an assignation house; that he had been at the house of defendant and had met one woman there for a lascivious purpose. Defendant lived in Galveston city, near Schmitt's garden; saw two or three other women going out at the back door at the time.

Tim. Brown, James Baker, and four others, testified that they did not know where the house of defendant was situated as to the street, but it is situated in Galveston city and county; knew the general character and reputation of defendant's house to be that of an assignation house; and on cross-examination by defendant, witness stated that their information of general reputation was formed from talking with their associates and acquaintances, and what they heard them say.

This testimony was admitted over the objections of the defendant. Defendant was convicted, and appealed.

Mills & Ferris, for appellant.

Frank M. Spencer and *N. G. Kittrell*, for the state.

GOULD, J. The case of *Morris v. The State*, 38 Tex., 603, recognizes the admissibility of evidence of the general reputation of a house for the purpose of establishing its character as a house of prostitution. The admissibility of such evidence is supported by decisions of other courts. See *The State v. McDowell*, Dudley, S. C., 346; *The State v. Hurd*, 7 Iowa, 412. Wharton says: "Common reputation of the character of the defendants,

and the house which they kept, and of the persons visiting them is admissible." 3 Whart. Am. Cr. Law, sec. 2393.

It is believed to be well settled that the character of the occupants may be established by evidence of their general reputation. 2 Bish. Cr. Pr., sec. 93. Whilst it is true that the admissibility of such evidence as to the house is denied by some authorities (see *Com. v. Stewart*, 1 Serg. & Rawle, 342), we see no sufficient reason for departing from the ruling in *Morris v. The State*.

The case before us does not present the question of the sufficiency of such evidence alone to support a conviction. One witness testifies not only that the house was so reputed, but proceeds to state facts which show that he knew the base uses to which it was appropriated. Whatever doubt we might entertain of the sufficiency of evidence of the general reputation of the house, unsupported by other testimony to justify a conviction, we think the additional facts in evidence in this case were sufficient.

A distinction is made in the argument of counsel, between an assignation house and a house of prostitution. In the absence of evidence to the contrary, we think the jury were justified in inferring that the use of the house as an assignation house was by common prostitutes.

There was some evidence on behalf of defendant, to the effect that she lived a quiet, peaceable life, and that there was no noise or disturbance at her house. This may have been true, and yet the house have been "disorderly" in the meaning of the law. A house of prostitution is within the act, however quietly and peaceably it may be kept. The judgment is affirmed.

Affirmed.

STATE vs. BOARDMAN.

(64 Me., 523.)

HOUSE OF ILL FAME: *Evidence.*

Under a statute making the keeping of a house of ill fame resorted to for lewdness a common nuisance, "house of ill fame" means the same thing as "bawdy house." And the gist of the offense being the use of the house for lewd purposes, and not its reputation, evidence of the reputation of the house is not admissible.

In a prosecution for keeping a house of ill fame, evidence of the reputation of the women who frequent the house, and the character of their acts and conversation in and about the house, is competent.

In a prosecution for keeping a house of ill fame, the house must be proved to be a house of ill fame by facts, and not by fame.

DICKERSON, J. The defendant is indicted for keeping a house of ill fame, resorted to for the purpose of prostitution and lewdness. The offense charged is that of a common nuisance. The language of the statute is as follows: "All places used as houses of ill fame, resorted to for lewdness or gambling, for the illegal sale or keeping of intoxicating liquors, are common nuisances." R. S., ch. 77, § 1. Section 2 of the same chapter makes "any person keeping or maintaining such nuisance" liable to fine or imprisonment in the county jail.

The terms "house of ill fame" and "bawdy house" are synonymous. "A bawdy house," says Bouvier, "is a house of ill fame, kept for the resort and unlawful convenience of lewd people of both sexes." So Archbold defines a bawdy house to be a house kept for the resort and convenience of lewd people of both sexes. 1 Bouvier's Law Dic., h. b.; 2 Archbold's Crim. Prac. & Plead., 1667; Bish. Crim. Law (5th ed.) 1883; *McAllister v. Clarke*, 33 Conn., 92.

The common signification of the word corresponds with its technical meaning. "A bawdy house," says Worcester, "is a house used for lewdness and prostitution, a brothel." The idea conveyed by the term "house of ill fame," or its synonym "bawdy house" is that of a house "resorted to for the purposes of lewdness and prostitution." A "house used as a house of ill fame" is a house thus resorted to; it cannot be so used unless it is thus resorted to, and if it is resorted to for such purpose, it is "a house used as a house of ill fame," in the purview of the statute, though it may not have that reputation. The phrase, "resorted to for lewdness," contained in the statute, does not qualify, enlarge or change the meaning of the preceding clause in this case; the statute, in this case, has the same meaning and application without as with that phrase.

In order to make out the offense charged in the indictment, under our statute, it is necessary to establish two things; first, that the house was used as a house of ill fame; and second, that the defendant kept it. The gist of the offense consists in the

use, not in the reputation of the house. Its reputation for lewdness and prostitution may be ever so clearly established, and yet if the evidence does not show that it was in truth used for those purposes, the first element in the offense is not proved; but if that is made out, it is immaterial what the reputation of the house was, or whether it had any. The reputation of the house, under our statute, makes no part of the issue. Testimony as to its reputation has no tendency to establish the issue that it was in fact used as a house of ill fame, and is inadmissible as mere hearsay evidence. On trial of an indictment for a nuisance, it is not admissible to show that the general reputation of the subject of the nuisance charged was that of a nuisance. 2. Whart. Crim. Law, § 2367; 3 Greenl. on Ev. (6th ed.), 186; 2 Bish. Crim. Proc., § 91. The judge in the court below erred in admitting such evidence.

We are aware that the court in Connecticut, in *Caldwell v. The State*, 17 Conn., 467, held that to support such an information, under the statute of that state, it is necessary to prove that the general reputation of the house was that of a bawdy house, and that it was such in fact. To establish the first proposition, the court in that case admitted evidence of reputation of the house, but distinctly say that such testimony would be clearly inadmissible to prove that the house was in fact a house of ill fame. We have seen that, under the phraseology of our statute, it is not necessary to prove the reputation of the house, and the case of *Caldwell v. The State*, 17 Conn., 467, thus becomes authority for excluding evidence of reputation in this case. 2 Bish. Crim. Proc., § 91.

Evidence of the reputation of the women frequenting the house, and the character of their conversation and acts in and about it is competent in such cases, as the judge ruled. *Commonwealth v. Kimball*, 7 Gray, 328; *Commonwealth v. Ganett*, 1 Allen, 8.

The judge also properly overruled the defendant's plea. *Ware v. Ware*, 8 Me., 42; Public Laws of 1868, ch. 151, § 6.

Exceptions sustained.

APPLETON, C. J., WALTON, BARROWS, VIRGIN and PETERS, JJ., concurred.

The chief justice and concurring justices appear also to have assented to this note upon the case by

PETERS, J. The house must be proved to be a house of ill fame by facts, and not by fame.

BAUMER *vs.* STATE. *

(49 Ind., 544.)

INCEST: *Indictment — Joint offense — Effect of acquittal of one.*

Under the statute of Indiana against incest between step-son and step-mother, each must have knowledge of the relationship, and an indictment against the step-son which does not allege that the step-mother knew of the relationship is bad on a motion to quash.

Incest is a joint offense, and if one of the parties has been tried and acquitted, this fact, if pleaded, is a bar to the prosecution of the other party for the same offense.

DOWNEY, J. This was a prosecution against the appellant for incest. The charge in the indictment is as follows:

"The grand jurors for said state of Indiana, impaneled, charged and sworn in the Wayne circuit court, to inquire within and for the body of the same said county of Wayne, upon their oath, charge and present that Arthur Baumer, late of said county, at said county, on the 30th day of May, A. D. 1874, did then and there unlawfully have sexual intercourse with his step-mother, Augusta Baumer, then and there knowing the said Augusta Baumer to be his step-mother, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Indiana."

The defendant moved the court to quash the indictment, but his motion was overruled, and he excepted. He then pleaded a special plea in bar, in which he alleged "that the said grand jury, which found and returned the indictment, at the November term, 1874, of the said court, also found and returned at the same time into said court as a true bill and indictment against Augusta Baumer, charging that she, the said Augusta, on the — day of May, 1874, at said county, did unlawfully have sexual intercourse with her step-son, Arthur Baumer (this defendant meaning), she, the said Augusta, then and there knowing that he, the said Arthur, was her step-son, which said Augusta Baumer so charged is the same Augusta Baumer named in the said indictment against this defendant, and the said Arthur Baumer named in the said indictment against the said Au-

gusta was and is this defendant, and the act of sexual intercourse charged in said indictment is the same act of sexual intercourse charged in this indictment against this defendant, and none other, and the offenses charged in the said two indictments so found and returned by the said grand jury were and are the same to all intents and purposes; and afterward, to wit, at the said November term of said court, the said Augusta Baumer, being arraigned in said court upon the said indictment found and returned against her as aforesaid, pleaded not guilty thereto, and the issue being joined in said cause between the state of Indiana and the said Augusta, the same came on for trial in said court, and was there tried by a jury duly impaneled in said court, and on said trial, it was proved by competent evidence, and beyond a reasonable doubt, that the said Augusta, at the time of the said alleged sexual intercourse, had knowledge of the relationship existing between her and the said defendant; that she was at said time the step-mother of the said defendant, and he was her step-son; and there was no evidence given on said trial proving, or tending to prove, that the said Augusta was, at the time of the said alleged intercourse, or at any other time, insane or of unsound mind, or incapable of understanding the criminal nature of said alleged act; and the said jury, having heard the evidence in the cause, and after due deliberation thereon, found and returned into said court their verdict in the words following, to wit:

“We, the jury, find the defendant not guilty.” And thereupon the said prosecution against her was fully ended; wherefore the said defendant says that the state of Indiana ought not further to prosecute the said indictment against him, and he prays that he may be discharged therefrom.

The state demurred to this answer; the demurrer was sustained, and the defendant excepted. The prisoner then pleaded not guilty. The cause was tried by a jury. There was a verdict of guilty, with punishment of nine months imprisonment in the county jail. Judgment was rendered accordingly.

The errors assigned being in question, the action of the court in overruling the motion to quash the indictment, and in sustaining the demurrer to the answer. The statute on which the indictment is founded reads as follows:

“If any step-father shall have sexual intercourse with his

step-daughter, knowing her to be such, or if any step-mother and her step-son shall have sexual intercourse together, having knowledge of their relationship, or if any parent shall have sexual intercourse with his or her child, knowing him or her to be such, or if any brother and sister, being of the age of sixteen or upwards, shall have sexual intercourse together, having knowledge of their consanguinity, every person so offending shall be deemed guilty of incest, and, on conviction thereof, shall be imprisoned in the state prison not less than two nor more than ten years, or may be imprisoned in the county jail not less than six nor more than twelve months." 2 G. & H., 452, sec. 45.

The section may be analyzed to advantage:

1. It declares that, "if any step-father shall have sexual intercourse with his step-daughter knowing her to be such," he shall be guilty. Here the step-daughter is not legally guilty of any crime. The step-father is guilty, if he have knowledge that she is his step-daughter, and this is so whether she has knowledge that he is her step-father or not. The crime is separate and several on his part.

2. "If any step-mother and her step-son shall have sexual intercourse together, having knowledge of their relationship."

This language, it will be perceived, is quite different from the preceding. It is required that they shall have sexual intercourse together, and that they shall both have knowledge of their relationship. In this case, both parties to the act became guilty and liable to punishment. The crime is a joint one, and one of the parties cannot be guilty unless the other also is guilty.

3. "If any parent shall have sexual intercourse with his or her child, knowing him or her to be such." In this case, the parent is the only party made criminally responsible. The crime is the separate and several crime of the parent, while the child is not punishable at all. Applied to persons sustaining this relation to each other, the law is like it is with reference to the relation of step-father and step-daughter.

4. "If any brother and sister, being of the age of sixteen or upwards, shall have sexual intercourse together, having knowledge of their consanguinity." Here, as under the second clause of the statute, the crime is joint. The parties must have intercourse together, with knowledge of their consanguinity.

The indictment in this case is on the second clause of the

statute, and consequently we need only decide upon the proper construction of that part of the section. That its proper construction is that which we have already indicated, we think is reasonably clear, upon the language of the statute itself.

We are referred by counsel for appellant to, and cite in support of this construction of the statute, the following authorities: Bish. Stat. Crimes, secs. 702, 721 and 731; *The State v. Byron*, 20 Mo., 210; *Noble v. The State*, 22 Ohio St., 541; *Delaney v. The People*, 10 Mich., 241. In the last named case, the information was on a statute, the language of which, so far as it affected the case in judgment, was as follows: "If any man and woman, not being married to each other, shall lewdly and lasciviously associate and cohabit together, * * every such person shall be punished," etc. It was held that the offense was joint, and that both of the parties must be guilty, or neither.

The indictment in the case which we are considering alleges only that the defendant "did unlawfully have sexual intercourse with his step-mother, Augusta Baumer, then and there knowing the said Augusta Baumer to be his step-mother." Such an allegation of the crime might have been good, according to our view of the statute, had the indictment been against a step-father, or a parent, where the guilty participation of the other party to the act is not a necessary ingredient of the crime. But, as between step-mother and step-son, where the crime is joint, and where both must be guilty, or neither, we think it is fatally defective.

It follows, from what has already been said, that the court erred in sustaining the demurrer to the answer of the defendant, setting up the acquittal of Augusta Baumer, the step-mother, and other party to the alleged joint crime.

In addition to the above cited authorities, we may, on this point, refer to the following: *State v. Tom*, 2 Dev., 569; *The King v. The Inhabitants, etc.*, 13 East, 411; *Turpin v. The State*, 4 Blackf., 72.

In the last named case, which was a prosecution for riot against three persons, upon the trial, two were acquitted, and one found guilty. It was held that upon this verdict, no judgment could be pronounced against the defendant found guilty. In the case of *Delaney v. The People, supra*, it was held that the parties must both be joined as defendants in the same information, but we do not care to lay this down as law. Whether they be prosecuted in

the same indictment or not, the crime must be charged as a joint crime. They may be tried separately, and one may be convicted and sentenced before the other is tried. If one be tried and acquitted, the other must be discharged; and, it is said in the Michigan case, that if one be tried, convicted and sentenced, and the other tried and acquitted, this will, *ipso facto*, render the first conviction void.

The judgment is reversed, and cause remanded, with instructions to quash the indictment, and discharge the defendant.

PEOPLE vs. WILSON.

(49 Cal., 13.)

INSANITY.

Where insanity is relied upon as a defense to a criminal charge, the burden of proof is on the respondent to establish his insanity at the time of the act; but such insanity may be established by a preponderance of testimony and is not required to be proved beyond a reasonable doubt.

By THE COURT.—Insanity of the defendant at the time of the commission of the alleged offense was one of the defenses relied upon at the trial. On this point the court charged the jury: "You cannot acquit him on the ground of insanity, because a doubt may arise in your minds on the question. His insanity must be made to appear to you beyond a reasonable doubt." Some of the authorities hold this to be the correct rule; but in this state the contrary rule has been settled by several decisions of the court, the latest of which was in the case of the *People v. McDonnell*, 47 Cal., 134. In that case we held that while the burden of proof is on the defendant to establish the insanity, it is sufficient to prove it by a preponderance of evidence, in other words, that "insanity must be clearly established by satisfactory evidence."

Judgment reversed, and cause remanded for a new trial.

WALLACE, C. J., concurring. As to whether a prisoner relying upon the defense of insanity at the time of the commission of the act charged against him as a crime, may rest upon mere preponderating evidence of the fact of insanity, or must

go further and establish his alleged insanity beyond a reasonable doubt, is a question upon which the authorities are in conflict. In view of the notorious facility with which this defense is often availed of to shield the guilty from just punishment, I should, if the matter were *res integra* in this court, be inclined to adopt the latter rule. But in the case of *The People v. Coffman*, 24 Cal., 220, the question was thoroughly considered here, and it was held that insanity might be established in a criminal case by the same amount of evidence by which it might be established in a civil action involving the question, that is, by mere preponderating evidence; and, upon the authority of that case, I concur in the judgment in this case.

SULLIVAN vs. PEOPLE.

(31 Mich., 1.)

INSANITY: *Practice* — *Remark by court in presence of jury.*

Evidence that the respondent was insane "on the night of the third or the morning of the fourth of January," when this is all the evidence that he was ever insane, and where there had been evidence that he was never insane, has no tendency to prove that he was insane on the morning of the second of January.

An improper remark by the court, adverse to the prisoner in the presence of the jury, will be considered on writ of error as though it were a part of the charge.

The court has no right to say in the presence of the jury that it was the duty of the prisoner to bring forward his defense on his preliminary examination.

ERROR to *Houghton Circuit.*

F. M. Brady and Chipman, Dewey & Hawes, for plaintiff in error.

Isaac Marston, Attorney General, for the people.

CHRISTIANCY, J. The plaintiff in error was tried in the circuit court for the county of Houghton, upon an information charging him with having, on the 16th day of December, 1873, at, etc., wilfully and feloniously, and of malice aforethought, assaulted, beaten, and wounded one William W. Perry, with the intent, him, the said Perry, then and there to kill and murder.

The defendant below (plaintiff in error) was convicted, and sentenced to the state prison at Jackson for ten years.

"There was evidence" (as appears by the bill of exceptions) "tending to show that respondent, on the morning of January 2, 1874, confessed having assaulted complaining witness in the manner charged in the information." And for the purpose, as it would seem from the record, of avoiding the force of this confession as evidence, the defendant seems to have undertaken to prove that he was insane when he made the confession — not when he committed the offense — and several exceptions were taken to the judge's charge as to the burden of proof upon that question, the nature of the evidence given upon it, and to a clause in the charge implying that defendant must conclusively prove the insanity.

But we think all questions connected with, or growing out of that of insanity, are outside of the case as presented upon this record.

The bill states that "there was evidence given on the trial tending to show that respondent was insane on the night of the third or the morning of the fourth of January, 1874; and there was evidence tending to show that he was never insane." Now the confession which the evidence tended to show was made on the morning of the second of January, and the record does not show that there was any evidence tending to show that defendant was insane at the time, nor until the night of the third or morning of the fourth; and the clear implication from the record is, that there was no such evidence. It is therefore quite immaterial upon this record what rulings the court may have made connected with the question of insanity. They cannot be assigned as error upon this record.

But the defendant set up in defense, and introduced evidence tending to prove an *alibi*. But upon his preliminary examination before the examining magistrate, he offered no evidence whatever.

As to proof of the *alibi*, it is objected that the court instructed the jury that it must be proved conclusively, or beyond a doubt, to constitute a defense. Though such language was incidentally used in one part of the charge, I am strongly inclined to think such was not the fair meaning of the whole charge upon this subject when taken together. The whole charge upon this point, after properly defining an *alibi*, was this: "When such a defense is made and proven, it is conclusive. It is the best defense that

can be interposed. It leaves no doubt of the innocence of the party accused, but it must be satisfactory. There must be no doubt about it, or else you cannot give it much credence; so that it becomes very important in connection with space and distance. You must be satisfied that the time and space correspond, and it being proved satisfactorily to you, and being found to be reasonable with time and distance, then it is conclusive. Then, after commenting upon the proof of insanity, which is not here in question, he concludes his charge as follows: "But it is your duty, gentlemen, to take the whole case, under the evidence for the people, and for the defense, and weigh it carefully—every trifling circumstance, every fact, remote or proximate, grave or trivial—all these go to make up the evidence in this case. If you believe, from all the facts and circumstances in this case, that the people have proven their case—for they have the affirmative, gentlemen—and it is their duty to convince you beyond a reasonable doubt—if they have sustained their charge, your verdict will be guilty. But if there should remain in your minds a well founded, reasonable doubt as to the guilt of the respondent, you must give him the benefit of that doubt. Entertaining such a doubt, your verdict will be not guilty, and you must acquit."

This last portion of the charge, if understood by the jury as extending to the question of an *alibi*, as I am inclined to think they must have understood it, would have corrected the error of the previous statement, that "there must be no doubt about it;" and the doubt referred to would be understood as a reasonable doubt."

In a criminal case, however, we must not only see from the record a probability that the defendant has not been injured by any erroneous expression in the charge, but we must be satisfied beyond any reasonable doubt, that he could not have been so injured.

We need not, however, determine this particular question in this case, as there is another error in the record for which the judgment must be reversed; and this particular question will not be likely to arise in the same form upon a new trial. The record states that during the closing argument for the prosecution, Mr. Chandler, one of the counsel for the people, commented adversely to the respondent upon the fact that he, the

respondent, did not interpose the defense of an *alibi* on the examination before the magistrate, it being a matter of record, and the fact appearing that the respondent offered no defense before the examining magistrate. The comment of counsel for the prosecution, being objected to by respondent's counsel, the court overruled the objection; and in the presence of the jury, remarked as follows: "It is the duty of a respondent, when he has a good defense in the nature of an *alibi*, to interpose that defense at the earliest moment possible; and a respondent should offer his defense of an *alibi* before an examining magistrate, with a view to saving himself anxiety and trouble, and the people the great expense of a trial."

Now, while for myself I think it may sometimes depend upon the circumstances of the case, whether the neglect of a prisoner to interpose such a defense before an examining magistrate shall be allowed to be commented upon against him, and considered by the jury (a point upon which my brethren reserve any opinion), yet, I think it quite clear the judge went too far in the present case, when, in the presence of the jury, and therefore having the same effect as if addressed to them, he used the language above cited. It is easy to see that there may have been good reasons why the defendant, however innocent, should, as matter of prudence, have neglected to go into the evidence of the *alibi* before the magistrate. It does not even appear that the witnesses sworn on the trial were present or attainable at the examination.

The judgment must be reversed, and a new trial awarded.

The other justices concurred.

WALKER vs. STATE.

(52 Ala., 376.)

BURGLARY: *Chimney*.

On an indictment for burglary, entering through the chimney of a cotton house is a breaking.

JUDGE, J. The indictment in this case was for burglary, and charged the defendant with breaking into and entering the cot

ton house of Archie Nicholson. The evidence tended to show that the defendant entered the house by going down the chimney, and that after thus entering, he got out of the house through a window, by breaking the fastening of the window from the inside of the house.

It is ingeniously contended by counsel for the defendant, that to constitute the crime of burglary, under section 3695 of the Revised Code, there should be a breaking into and entering one of the houses described in said section; and that as the evidence in this case showed, that the defendant entered and broke out of the house, he was not guilty of the offense charged.

By the common law, descending the chimney of a house is an actual breaking, as much so in legal effect as would be the forcible breaking into a house by any other means. 3 Greenl. Ev., § 76. And such was recognized to be the law by this court in *Donohoe v. The State*, 36 Ala., 281.

In that case the defendant got into and attempted to descend the chimney of a storehouse, but was arrested in his descent, when near the arch of the fireplace, by the smallness of the aperture; and he became so tight and fast that he could not be pulled out, either at the top of the chimney or at the fireplace below, and the chimney had to be pulled down to extricate him. Although the defendant did not enter any room of the house, he was adjudged to have been guilty of the burglary. The court held that a chimney is a necessary opening, and needs protection, as a part of the dwelling house, it being as much closed as the nature of things will admit; and this decision seems to have been well fortified by the numerous authorities cited in the opinion of the court.

There is no error in the record, and the judgment of the circuit court is affirmed.

STATE vs. POTTS.

(75 N. C., 129.)

BURGLARY: *Dwelling house.*

If a part of a storehouse, communicating with the part used as a store, be slept in habitually by the owner or by one of his family, although he sleeps there to protect the premises, it is his dwelling house.

If a person who sleeps in a part of a store house communicating with the part used as a store is not the owner, or one of his family or servants, but is employed to sleep there solely for the purpose of protecting the premises, he is only a watchman, and the store is not a dwelling house.

RODMAN, J. There is no statute in North Carolina changing the common law definition of burglary, which is: The breaking and entering of *the dwelling house* of another in the night time, with intent to commit a felony therein. The question in this case is: Was the house into which the prisoner broke and entered, *the dwelling house* of the prosecutor, Davis? The house belonged to Davis, and was used as a store; a small space was partitioned off from the store-room for a bed-room, and it had been occupied as such regularly for about four years, either by Davis or by some clerk, or other person by his license. It was slept in on the night of the breaking, and had been, on every night for a month before that night, by one Lamb, who was employed by Davis to sleep there for the purpose of protecting the premises. Lamb was not a member of the family of Davis, nor employed by him otherwise than as stated.

The Attorney General relies on the *State v. Outlaw*, 72 N. C., 598. That case can only be distinguished from the present by the fact that Harriss (the person who slept in Cunningham's store) was a clerk of Cunningham and boarded in his family. It was evident that he slept in the store for the protection of the premises. We do not doubt the decision in that case. The differences between that case and the present may seem very slight, yet if they be such as are recognized by the authorities from which we derive the law on this subject, we are bound to recognize them as distinguishing the two cases. Considering the various ways in which houses may be occupied, it is not the fault of the law if the line of separation is thin, or even artificial. The following quotations are all from 2 East P. C., pp. 497, 498. It is clear that if no person sleeps in a house it is not burglary to break in it. *Hallard's Case*. In *Brown's Case*, all the judges agreed that the fact of a servant having slept in a barn the night it was broken open, and for several nights before, being put there for the purpose of watching against thieves, made no sort of difference in the question whether burglary or not. *So a porter lying in a warehouse to watch goods, which is only for a particular purpose, does not make it a dwelling house.*

In *Fuller's Case*, the house, which was a new one, was finished except the painting and glazing, and a workman employed by the owner slept in it for the purpose of protection; but no part of the owner's family had taken possession of it. *Held*, not a dwelling house.

In *Harris's Case*, it appeared that the prosecutor had lately taken the house, and on the night of the offense, and for six nights before, had procured two hairdressers, none of his own family, to sleep there for the purpose of taking care of his goods and merchandise therein deposited; but he, himself, had never slept there, nor any of his family. *Held*, not a dwelling.

In *Davis's Case*, one Pearce owned the house, but resided at a distant place. It was not inhabited in the daytime, but a servant of the owner slept there constantly for about three weeks, solely for the purpose of protecting the furniture till a tenant could be procured. *Held*, not a dwelling house.

It seems from these cases, that if part of a storehouse, communicating with the part used as a store, be slept in habitually by the owner, or by one of his family, although he sleeps there to protect the premises, it is his dwelling house. If the person who sleeps there is not the owner or one of his family or servants, but is employed to sleep there solely for the purpose of protecting the premises, he is only a watchman, and the store is not a dwelling house.

The distinction is not altogether arbitrary or without reason. To break into a house where the proprietor or any of his family sleep is apparently a more heinous offense and calculated to produce greater apprehension and alarm, than to break into a house occupied primarily for business, although a watchman is employed to sleep there. It is competent for the legislature to punish the latter offense in any manner otherwise than capital that it may think proper. I have not seen that by the legislation of any state such an offense is capital, as it would be in this state if held to be burglary. In New York it is burglary by statute, but it is punishable only by imprisonment in the penitentiary.

As our opinion on this question entitles the prisoner to a new trial, it is unnecessary to consider the other questions raised on the record.

There is error in the judgment below, which is reversed. Let this opinion be certified to the end, etc.

PER CURIAM:

Judgment reversed.

WOODWARD vs. STATE.

(54 Ga., 106.)

BURGLARY: *Intent—Evidence.*

Evidence that the respondent entered the prosecutor's house between twelve and one o'clock at night by raising a window of the room in which the prosecutor and his wife were sleeping, and, when discovered, went out through the window, there being money and clothing in the room, is sufficient to sustain a conviction for burglary, although it does not appear that respondent stole anything.

The intent with which a prisoner breaks and enters the dwelling house of another in the night time is a question of fact for the jury under all the facts and circumstances of the case.

WARNER, C. J. The defendant was indicted for the offense of "burglary in the night time," and on trial thereof, was found guilty by the jury. A motion was made for a new trial, on the ground that the verdict was contrary to law, contrary to the evidence, and without evidence to support it, which motion was overruled by the court, and the defendant excepted. It appears from the evidence in the record that the defendant, between the hours of twelve and one o'clock at night, raised the back window sash of the prosecutor's dwelling house, in which he and his wife were sleeping, propped it up with a stick, and entered the room through the window, and when discovered, went out at the window, was pursued and caught. There was money and clothing in the room. Prosecutor had \$100 in his vest pocket, hanging on the bed post, but it does not appear that the defendant stole anything.

Burglary, as defined by the code, is the breaking and entering into the dwelling, mansion or storehouse, or other place of business of another where valuable goods, wares, produce or any other articles of value are contained or stored, with intent to commit a felony or larceny: Code, sec. 4386. The defendant is charged with having broke and entered the house with intent to commit a larceny, and the point made is, that there is no evidence that such was the intention of the defendant.

The intention of the defendant can only be ascertained from his acts and conduct, and it was a question for the jury to decide, under the facts and circumstances as detailed by the evidence, what was the defendant's intention in breaking and enter-

ing the house at the time of night as proved by the prosecutor. Roscoe's Crim. Ev., 367. We find no error in overruling the motion for a new trial.

Let the judgment of the court below be affirmed.

WATERS vs. STATE.

(53 Ga., 567.)

BURGLARY: *Evidence.*

In a prosecution for burglary, the testimony should be such as to the time when it was committed as to exclude all reasonable doubt that it was committed in the night time.

In a prosecution for burglary, where the evidence leaves the time in which the offense was committed exactly balanced between day and night, that is, that it was committed within a period of about forty or forty-five minutes, one-half of which was day and one-half of which was night, the defendant should have the benefit of the doubt necessarily arising, and ought not to be convicted of a breaking in the night time.

TRIPP, J. 1. The proposition is unquestioned, that in all criminal prosecutions, it is incumbent on the state, on the traverse trial, to show affirmatively, either by positive testimony or other satisfactory evidence, that the defendant is guilty of the offense charged against him, or of some less crime which the law permits him to be found guilty of under the indictment. This rule applies to an indictment for burglary in the night. It was but a few years ago that this offense was punishable with death, or, by special recommendation of the jury, by imprisonment for life, whilst the penalty for burglary in the day was imprisonment from three to five years. Rev. Code, secs. 4321, 4322. Now the penalty for the former is imprisonment from five to twenty years; for the latter it is unchanged. Would it be going too far to say that when one is prosecuted for burglary in the night, the testimony should be such as to the time when it was committed as to exclude all reasonable doubt upon that point, before a verdict of guilty could be authorized? If there had been no change in the penalty, and that was yet a capital one, the rule would scarcely be doubted. As it is, the maximum for one grade is twenty years in the penitentiary; for the other, five years.

2. Where the evidence leaves the time in which the offense was committed exactly balanced between day and night, that is, that it was committed within the period of about forty or forty-five minutes, one-half of which was day and one-half was night, the defendant should have the benefit of the doubt necessarily arising, and the conviction should not be for the highest grade. If a jury reasonably doubt whether a defendant be guilty of murder or manslaughter, that doubt is resolved in favor of life. So, if the doubt be as to different grades of manslaughter, the defendant should have the benefit of it, and the lowest grade covered by that doubt is to be found. It would be difficult to limit the application of this principle, and we think it should control this case. The chief evidence against this defendant was the fact that he was in possession of the watch, which was taken from the house several days after the burglary was committed. I will not remark upon the character of such testimony, whether it is always sufficient to convict, for the authorities are somewhat in conflict; but we say, that, under the proof in this case, we think the defendant should have the full benefit of the first rule we announce in this decision.

Judgment reversed.

STATE *vs.* McDONALD.

(73 N. C., 346.)

BURGLARY: *Confession — Evidence — Indictment.*

Evidence that on the morning of August 12th, the prosecutor discovered between daylight and sunrise that his house had been broken into, that the house was on a public street in a town, and that a dry goods box and chair had been placed beneath the window where the entry was effected, is sufficient evidence to be submitted to the jury that the breaking was in the night time.

There is no rule of law which prohibits a grand juror giving evidence against a prisoner who is being tried on an indictment found by the grand jury of which the grand juror was a member.

Voluntary confessions are admissible against the prisoner.

When an offense is made of a higher nature by statute than it is at common law, the indictment must conclude against the statute; but when the punishment is the same or less, it need not so conclude.

INDICTMENT for burglary, tried before Buxton, J., at January term, 1875, *Cumberland* Superior Court.

The following is the evidence in the case:

Thomas J. Green, the prosecutor, was introduced as a witness for the state, and testified: I am captain of a steaunboat plying between Fayetteville and Wilmington. On the night of the 11th of August, 1874, my dwelling house on Person street, in Fayetteville, was forcibly entered by prying open the blinds of a window on the east side of my house. These blinds I had hooked myself the evening before, and left the sash up for air. On the next morning I noticed my axe lying on the ground under the window. A goods box was also under the window and a chair beside it so as to form steps. I noticed a slight impression or dent in the blinds, and signs of dirt as if from the axe. This was the sleeping room of my little daughter, aged twelve years, and of the nurse. The next morning I found these were the only window blinds open; they were pushed to, but the wrong one first, so as not to shut up tight. The rest of the windows were all closed and the doors were all locked. I had closed and fastened these windows myself before lying down. My own family, consisting of myself and wife, and five children, were all at home. We also had a guest with us that night named Mrs. Carver. I was the first one to rise the next morning. I rose when it was clearly light, between daylight and sunrise. I lost my vest, which I had hung up the night before in the passage at my bedroom door, and with it my watch, which I had left in my vest fob. I also missed my overcoat and \$50 in currency. This money was in a memorandum book, which I had handed to my wife the day before. I found the book on the parlor mantel, but no money. The watch was a fine gold lever watch, with thick hunting case. It was of the make of S. J. Tobias & Co., Liverpool, No 32,398; on one side a landscape was engraved and on the other a sportsman in the act of shooting a deer. The hands were large steel hands, unusually large, which I had put on specially to see at night. The watch cost \$180, and was 18 carats fine. My kitchen was connected with my dwelling, forming an L, and is sixteen feet from my dwelling. It was entered the same night. The nails over the window sash were broken and the sash was taken out. I think I would recognize my vest. (A vest was then shown to the witness.) This is my vest which my watch was in. I found this vest in a trunk at the prisoner's house on the 11th or 12th of December last. The

trunk was locked, the key could not be got, and the officer broke open the trunk, the prisoner not being present. We found in the trunk this vest; there were also in it an old coat and pants. We saw another trunk there, the key to which we found; it contained the regular clothing of the prisoner. I certainly recognize this vest as the one which contained the watch. I had the prisoner, Robert McDonald, arrested by an officer acting under a state's warrant, at a house four miles from Fayetteville. I had a conversation with the prisoner on our way to town.

The state's counsel proposed to give this conversation in evidence. The counsel for the prisoner objected, and thereupon in reply to questions asked him, the witness answered as follows: The prisoner seemed anxious to communicate. I made no threats, but spoke mildly to him and used no harsh words. The prisoner's counsel then remarked: "It appears no threats were used, and that the statement was voluntarily made; the objection is withdrawn."

The witness then further testified: The prisoner then stated that he bought this vest, a bucket of butter and a piece of cheese weighing five or six pounds, on Friday night, the 4th of December last, between ten and eleven o'clock at night, of a colored man named William Richardson. I asked if this was all he bought. He answered, "yes." I asked, "Robert, did you ever have my watch?" he answered, "Not as I know of. I sold a watch for William Richardson in September last." He then described my watch nearly as accurately as a jeweler would have done it, except the number. I think the prisoner knew my watch; he had seen it time and time again. He had been with me on my boat from 1870, off and on. His name is on my pay roll from that time, at intervals. I asked, "Robert, what did you get for the watch?"

Here the prisoner's counsel renewed the objection to the admission of the conversation, on the ground that the prisoner was under arrest on a criminal charge, was then actually in the custody of the officer, and was not notified that his answer would be used against him, as was admitted by the witness. Upon this ground the counsel for the prisoner moved the court to exclude the whole conversation, both that which was already in evidence and that which follows.

His honor ruled that the state was entitled to introduce the

whole of the conversation on that occasion in evidence, especially after a part of the same had been given in evidence upon a withdrawal of objection by the prisoner's counsel. To this ruling of his honor, the prisoner excepted.

The witness then further testified.

He answered, "Twenty dollars." I asked, "To whom did you sell it?" He answered, "To the captain of a vessel." I asked if he knew his name; he replied that he did not; I asked if he could tell me where the vessel was lying; he answered, "At or near the old New York steamship wharf, in Wilmington." This is a wharf near against the wharf of Worth & Worth. I said, "Robert, it could not have been possible you sold the watch for \$20." He said, "Yes, sir." I said, "Did you know that it was a gold watch?" He said he did not know it, but thought it was; that Richardson told him if he could get \$20 for it to sell it; that it was a galvanized watch; he had won it gambling. I asked, "Robert, are you telling me the truth? That was a fine gold watch, and I prized it highly; it was a present; can't you put me in the way of recovering it?" He said, "Captain, I sold it." The prisoner lived about a mile from me; I saw him here about election time, in August, a few days before; he worked about the river. The pay of a deck hand is \$16.50 per month.

Upon cross-examination, the witness testified as follows:

The prisoner worked for me last spring (1874) a short while; he worked for me some every year since 1870; he had not worked for me regularly for the last two years; he worked for me in 1871. William Richardson, the colored man to whom the prisoner referred, has worked for me regularly for the last two years; he has not lost ten days. When my boat would come up the river, I usually sent some of the hands, when there was nothing else to do, to my house to saw wood. Richardson was up at Fayetteville the night my house was robbed; he frequently chopped wood at my house; he claimed to stay at Allen Harris', near the flour warehouse, one hundred yards from my house. I had Richardson arrested and put in jail for this charge. The prisoner was arrested first, and on the same evening I had Richardson arrested. All I had against Richardson was the prisoner's statement. Both were put in jail. I had before this caused the arrest of two other men, Abram Williams and Adam Jessup, who were both discharged. William Richardson was used as a

witness. I had twelve boat hands under me. I carried the watch before the war. Richardson had as good a chance to see the watch as the prisoner; I have stood with the watch in my hand, timing boat hands in rolling barrels. I would not swear the prisoner ever saw the hands of the watch or the engraving of the hunter on the case. I have never seen my watch since it was stolen; I did not see the vest from the time it was taken, on the 11th of August, at night, until I saw it in the prisoner's house two weeks after the 4th of December, on Friday. I did not tell the prisoner what he was arrested for; I did not tell him I had got my vest; he told me without hesitation about his getting the things from Richardson. Richardson was in town the night my house and kitchen were robbed, and the next day.

Upon redirect examination the witness testified:

The prisoner said the butter was in a tin package, sealed up like a paint can. I asked, "What did you do with that package?" He said, "We used a part, and I carried the balance to my sister the day before." This conversation occurred the day of the arrest, on a Friday, two weeks after the 4th of December, 1874, being the 18th of the month. I did not lose cheese and butter on the occasion of my house being entered on the night of the 11th of August, but on a subsequent occasion when my house was entered again by some one. The prisoner described the watch as having a white face, large steel hands, and ordinary chain worn smooth.

Capt. Oldham was introduced as a witness on behalf of the state, and testified as follows: I know the prisoner. I saw him in Wilmington on the 12th of September last on board of a vessel run by Capt. Lyons, lying at Leppill's wharf. I then saw in the hands of the prisoner on board the vessel a double cased watch with a landscape engraved on one side, and on the other a hunter, a deer, and a dog. It had a white face and large steel hands; its number was 32,398. I made a memorandum at the time. I asked the prisoner his object in selling. He said he was then away from home, without money, and sick, and wanted money to get home with, and that he lived in Charleston, that he would take \$75 for it, but would prefer to pawn it for \$20 as he had owned it a long time, and hated to part with it. I asked what guaranty he would give that the watch would be called for. He answered that he had owned the watch a long time and

swinging it around his head he said he would not be afraid to show it in any city. I asked him to give me the names of some people living in Charleston. He mentioned some names. I did not know them. I knew such names in Wilmington. I am not acquainted in Charleston. When I went up to him he had the watch and chain both in his pocket and out of sight. I went to question him in consequence of information I had received. I afterwards, during the same day, searched the wharf for the prisoner, and could not find him. Search was also made by detectives, but we did not find him.

Upon cross-examination the witness testified: I never saw the prisoner before the 12th of September last. I took down the number of the watch. A man came to me and asked me to go and look at the watch. It was Capt. Lyons of the schooner. I told the prisoner that \$75 was more than I would give for the watch. Capt. Lyons was on board the vessel when I got there. So was the prisoner. I told Capt. Lyons I had come to see the watch, and he pointed out the prisoner to me. I went up to the prisoner, and asked to see the watch he wanted to sell. I do not know whether Capt. Lyons bought the watch. I left the prisoner on board. I was there some fifteen minutes. I did not search any house in Wilmington for the prisoner. I did not take down the name of the maker of the watch.

William Richardson, a witness for the state, testified as follows: I have been working for Capt. Green for three years. I never sold a vest, or butter, or cheese to Robert McDonald. I never gave him a watch to sell.

Upon cross-examination the witness testified: I live below the flour warehouse. I work for Capt. Green on the boat, and sometimes cut wood for him at his house. I came up the river the morning of that night on the boat with Capt. Green. That night I was out between 11 and 12 o'clock. There was a little festival going on in town that night. I went there and got home at 11 or 12 o'clock. This was the night of the last robbing. On the night of the first robbing there was a procession in Fayetteville, and it was raining. I was in the street awhile burning barrels. I was at Capt. Green's next morning about 7 o'clock. I lived one hundred yards off. I had heard up the street about the robbing and I went to see and look about. I saw they had robbed the house. I was arrested by the deputy sheriff the same

day the prisoner was, while I was at work on the boat. I proved where I was. Ned Gilmore was one of my witnesses. Julius Evans and Sam Jones proved where I was. They were examined by 'Squire Whitehead. The prisoner did not get any of the things from me. I know Capt. Greens' watch because it was a watch he had a long time, and I saw it so often. He pulled it out so often when I worked under him. It had a white face and the largest steel hands I ever saw on a watch. It was a double case gold watch. I never had hold of it. It had a heavy gold or plated chain. I have vests (the witness had on no vest at the time); I never sold any to the prisoner. I came from Bladen county and formerly belonged to Dr. Richardson. I used to run on the railroad train, but my partner got his arm cut off and I quit. His name was Wash. Chapman. We were train hands.

Upon redirect examination the witness testified: I asked the prisoner while we were in jail, why he had me put in jail for nothing? He said somebody like me brought the thing to him. The prisoner was not working on the boat when this happened.

Joseph A. Worth, a witness for the state, testified: "On one occasion after the prisoner was committed to jail by the justice of the peace, I went to see him, in company with the deputy sheriff and Captain Green, to get information about Captain Green's watch. The prisoner was told he was not bound to answer, and that anything he said might be used against him. I asked him where he got the ten dollars in money he had sent his wife."

The prisoner objected to the evidence of the witness, on the ground that he was a witness and also foreman of the grand jury that passed the bill which was now being tried. The counsel for the prisoner took the ground that he was on that account an incompetent witness; as presiding officer of the grand jury he was, in effect, a judge, and could not also be a witness in a case before him. The witness stated that he was foreman of the grand jury, and had been sworn as a witness and examined before the grand jury, but did not vote upon the bill. The rest of the grand jury were all present, and voted aye on the bill. There was no dissenting voice. It was usual when there was any dissenting voice to require a division. There was no dissenting voice and no division in this case. His honor overruled the objection, and the prisoner excepted.

The witness then testified: "The prisoner, in reply to my

question, said that he had carried four dollars away from here with him, and had earned the other six on the wharf, in Wilmington. I asked him if he really did sell the watch to the captain of the vessel? He answered 'yes.'"

Upon cross-examination, the witness testified: "I was present at the trial before 'Squire Whitehead, the examining justice. Both Richardson and the prisoner were charged. Gilmore was examined, but not as to an *alibi* for Richardson. Julius Williams was there. Richardson was examined."

Upon redirect examination, the witness testified: "I have known the prisoner for several years; his means are limited; he is a laboring man, and lives by work."

Thomas J. Green was recalled by the state, and testified: "I think I know the general character of the witness William Richardson. His associates think well of him; I have never heard him accused of stealing."

Upon cross-examination, the witness stated that he had Richardson arrested about this matter.

The counsel for the prisoner asked the court to charge the jury:

1. That there is no evidence that the house of the prosecutor, Captain Thomas J. Green, was broken and entered in the night time; that in a charge of this nature, time was a material circumstance to be established, and by direct and positive testimony, and not by mere inference.

2. That the possession by the prisoner was not a recent possession, so as to raise a presumption in law that the prisoner stole them.

His honor declined to give the first instruction prayed for, and charged the jury in relation thereto as follows:

"That it was absolutely necessary for the state to prove, to the entire satisfaction of the jury, that the breaking and entering was done in the night time, that is, at a time when there was not daylight enough to discern a man's face in the yard. That it was competent to prove this, as well as other indictments of burglary, by circumstantial evidence. The effect of the evidence, however, must be so convincing on the minds of the jury as the sworn evidence of a credible eye witness. The jury are not to jump at conclusions. In this case there is some evidence to be considered by the jury, that the breaking and entering was done

in the night time. The circumstances detailed in the evidence, tending to show this, have been referred to by the counsel on the part of the state, viz.: the early hour when the discovery was made by Captain Green that his house had been entered and robbed, stating that he rose when it was clearly light, between daylight and sunrise, the preparation made for effecting the entrance, the getting together under the window, the axe, box and chair, involving the expenditure of time in making these arrangements, the time taken in effecting the entrance and completing the robbery in the house, the situation of the house on a public street in Fayetteville, involving exposure if the entrance had not been effected in the dark."

These circumstances were pressed upon their attention by the counsel, to satisfy them that the breaking and entering was done in the night time. The state must satisfy the minds of the jury upon this point beyond a reasonable doubt, otherwise a conviction of burglary is out of the question.

To this charge of his honor the prisoner excepted.

His honor gave the second instruction prayed for, but added: "While the possession by the prisoner of the watch and vest, owing to the lapse of time since the loss, was not a recent possession, so as to raise a legal presumption of guilt, yet the fact of possession is a circumstance to be considered along with the other circumstances of the case, in determining the question whether the prisoner was guilty of the larceny. Whether these circumstances were proved, and what weight they were entitled to, it was a question for the jury to say. Among these was the circumstance that the articles, the vest and the watch, stolen from the house at the same time, are found in the possession of the prisoner; that one of the articles, the watch, was of a nature and value unsuited to the means and condition in life of the prisoner; that he was contradicted by William Richardson in his account as to how he came by these articles; the conflicting character of his own statements in reference to the watch, made to Green and Oldham."

To the foregoing portion of his honor's charge, the prisoner excepted, especially to his honor's including in the enumeration of circumstances "that one of these articles, the watch, was of a nature and value unsuited to the means and condition in life of the prisoner."

The jury returned a verdict of "guilty of burglary," and thereupon the prisoner moved for a new trial. The motion was overruled, and the prisoner moved in arrest of judgment upon these grounds:

1. Because the indictment was concluded at common law, whereas it should have concluded, "against the form of the statute."

2. Because the indictment charged that the breaking and entering was for the purpose of committing a larceny, whereas the offense of burglary consists in breaking and entering for the purpose of committing felony.

The motion in arrest was overruled, and judgment of death pronounced by the court, from which judgment the prisoner appealed.

W. L. McL. McKay and *Guthrie*, for the prisoner. *Hargrove*, Attorney General, for the state.

BYNUM, J. None of the objections raised by the counsel for the prisoner are available to him.

1. The confessions of the prisoner were voluntary and admissible, even without the consent of the counsel; but when the counsel withdrew his objections, and allowed the greater part of the conversation between the witness and the prisoner to be given in evidence, he had no right, by removing the objection, to exclude a part or the whole. *State v. Davis*, 63 N. C., 578.

2. We know of no rule of evidence which excluded the testimony of Worth because he was a grand juror, even if he had acted as such in finding the bill. But when it appears that he declined to act or vote on the bill, because he was a witness, there is no ground for objection to his competency.

3. The counsel for the prisoner asked the court to instruct the jury that there was no evidence that the breaking was in the night time. This was properly refused, because there was much evidence given, going to show that the breaking and entering were in the night time. The evidence is set forth in the case, and we think it fully sustains the ruling of the court; and when the court proceeded to charge the jury that they must be satisfied, beyond a reasonable doubt, that the breaking and entry were in the night time, it was then for them to say from the evidence how the matter was.

4. The court was asked to instruct the jury that the possession of the watch proved, was not such a recent possession as raised the presumption of law, that the prisoner was the thief. This instruction was given, but the jury were told that this possession of the stolen article was a fact which they might consider with the other fact upon the question of his guilt. In this there was no error.

5. The counsel moved in arrest of judgment, because the indictment concluded at common law, when it should have concluded against the statute.

This objection is disposed of by this court in the case of the *State v. Ratts*, 63 N. C., 503. When the offense is made of a higher nature by statute than it was at common law, the indictment must conclude against the statute; but if the punishment is lessened, it need not so conclude. In our case, the offense of burglary is the same that it was at common law, and the punishment is neither greater or less than it was at common law, but the same. The conclusion of the indictment was therefore proper. The other objections made in the record have no force in them, and were not insisted upon in this court.

There is no error.

PER CURIAM:

Judgment affirmed.

STATE vs. FENN.

(41 Conn., 590.)

LARCENY: *What constitutes — Felonious intent — Description in information — Variance — Evidence.*

An officer of a bank with which a note of the defendant had been left for collection called on the defendant with the note for payment. The defendant asked to be allowed to see the note, and on its being handed to him, walked out of the room with it, and secreted or destroyed it. In a prosecution against him for theft, it was *held*, on a motion of the defendant for a new trial, that the court below properly charged the jury that if the defendant obtained possession of the note with a felonious intent, the act was theft.

Also that the court properly charged that the intent to deprive the owner of his property, and to gain some advantage to himself, constituted a felonious intent.

The "taking" in theft need not necessarily be secret, and without the knowledge of the owner, but may be done openly, by deception, artifice, fraud or force.

The note was described in the information as "a certain promissory note dated November 6, 1872, signed by the defendant, for the payment to W. or order, of \$2,300 on the 1st of May, 1872, value received, a more full description of which is to the attorney for the state unknown." *Held* to be sufficiently described.

The note was in fact for \$2,300 and interest and all taxes. *Held* not to be a fatal variance, all that is required being such substantial accuracy as shall make the identity of the note unquestionable, and protect the accused from another prosecution for the same offense.

And *held* that the defendant, who wrongfully took the note and destroyed it, should not be permitted to say that it was not described with the utmost particularity.

The note was payable to W. or order, and was by W. endorsed to H., and by H. endorsed in blank, and it had been left by H. at a bank for collection. The information described the note as the property of H. *Held* that the fact of its being indorsed by H. did not necessarily show that H. was not still the owner, and that the judge below, after instructing the jury that the note must have been delivered by W. to H. properly left it to them to say from all the evidence, whether W. had delivered the note to H., and whether H. was still the owner.

And *held* that the judge properly charged the jury that the state was bound to prove the note to be of some value, but that they were not limited to direct evidence on this point, but might consider any evidence from which the value might be inferred.

INFORMATION for theft; brought to the Superior Court in *New Haven* County, and tried to the jury, on the plea of not guilty, before Loomis, J.

The information charged that at the town of New Haven, on the 3d day of May, 1873, William S. Fenn of said town, with force and arms, one certain promissory note, dated November 6, 1872, signed by the said Fenn, for the payment of twenty-three hundred dollars, for value received to F. J. Whittemore or order, on the 1st day of May, 1873, and by the said F. J. Whittemore endorsed, and by him delivered to Henry A. Warner, of said New Haven, a more particular description of which is to the attorney for the state unknown, of the goods and chattels of said Henry A. Warner, and of the value of twenty-three hundred dollars, feloniously did steal, take, and carry away, contrary to statute in said case made and provided, and against the peace.

Upon the trial the state offered in support of the prosecution the evidence, among others, of *William T. Bartlett*, who testified as follows: On the 30th of April, 1873, I was and ever since have been the treasurer of the Union Trust Company of New Haven, a company engaged in banking business, and on that day

Henry A. Warner left with me as such treasurer, a note for collection, the proceeds to be placed to the credit of Warner if collected, but if not paid on demand, the note to be protested in the usual manner.

The note was taken possession of by the defendant, and he did not return it to me. He stated that he had placed it in the hands of a friend, and subsequently he stated that he had used it in a water closet. The last I saw of the note the defendant took it. I think a correct description of the note is as follows:

"\$2,300. New Haven, November 6th, 1872. On the first day of May, 1873, I promise to pay to F. J. Whittemore or order twenty-three hundred dollars, with interest semi-annually, and all taxes assessed on said sum, value received. *W. S. Fenn.*" [To the introduction of this evidence the defendant objected, on the ground of variance as to payment of semi-annual interest and taxes. The state claimed that there was no variance, as at most it was a redundancy of proof and not of allegation, and also that as the defendant had destroyed the note, it was not competent for him to object that it was not described with exactness. The court overruled the objection, and admitted the evidence.] The note was endorsed, "Pay H. A. Warner or order. F. J. WHITEMORE." Also endorsed "H. A. WARNER." [This was excepted to by the defendant, as the information did not state how the note was endorsed, but the court overruled the exception and admitted the evidence.] I had sent notice to Fenn of the time the note fell due, and on the 3d day of May, 1873, the note not being paid, I took it, being a notary, to demand payment and protest it. Having the note, I called on Fenn at his office in the Globe building, New Haven. I said to Fenn, "I came to make an official demand for the payment of this note," at the same time holding the note in my hand. Fenn said, "you wish it paid, do you?" I said, "I do." Fenn then said, "Do you wish it paid to-day?" I said, "Certainly, it is due to-day." Fenn then said, "Let me see the note." I placed the note in his hand as he was sitting down. He took it and turned it over and examined the endorsements, as was customary, and then asked me, "What is the amount of interest due?" I replied that I had not computed it, understanding that he was not ready to pay it. Fenn then said, "Well, figure the interest." I then looked about for a bit of paper and commenced to figure the interest, the

note still being in his hand; he had moved off some little distance from me at that time. While I was busy computing the interest, Fenn said, "I would like to speak to a friend a moment," and stepped out the door. I waited as I supposed a sufficient time for his return, and he not appearing, I stepped to the door leading from the room at the top of the stairway leading to the street. I stopped there for a short time, when Fenn appeared coming from an inner apartment. I could not tell where. He was about to pass me and go down the stairs to the street, and said: "Step into my office a moment and I will step out and get the money," and also said something about going to the bank in that connection. I said that he had better leave the note with me while he went out. He then said he had handed the note to a friend, or placed it in the hands of a friend. I said to Fenn that he could not leave the building till he produced the note. He turned and went into his office without any opposition. I then went to the foot of the stairs and saw a policeman, and requested him to sit in the room occupied by Fenn till my return. I went out and consulted the authorities, and returned to Fenn's office, and said to him that I did not wish to make him any trouble; if he would produce the note that was all I required. Fenn said he could not produce it, as it was in the hands of a friend. I said to him, "Can you produce the note if you go to see your friend?" He said he could see. I said to him, "You certainly know whether you can produce the note or not, if you go to your friend." He said he could see. Not getting any satisfaction, I went out and put the matter in the hands of John W. Alling, city attorney. Mr. Alling drew up the necessary papers and went to Fenn with me. He said to Fenn that he had got himself into trouble, and he had better produce the note. Fenn said he could not do so. Alling then asked Fenn what he had done with the note. He replied that he went to the water closet and used it. Alling said it was an important matter, and he had better go to the water closet and see if it could not be found, and I believe they went. Fenn left the room in company with the officer. They soon returned and reported that they had examined the water closet without having found the note. I then left the matter in the hands of the city attorney, and returned to my place of business.

Cross-examined. The original note was not before me when

I have the copy I have here. I made it first from recollection, but afterwards took the copy from the record of the mortgage made to create this note as recorded in the office of the town clerk. The note was secured by mortgage of real estate. My recollection of the endorsements on the back of the note is as follows: "Pay H. A. Warner or order. F. J. WHITEMORE." Further endorsed: "HENRY A. WARNER." I went to Fenn's office about three o'clock. He was sitting at his table, but not engaged at the time, I think. It was probably only two or three minutes after I first spoke to him that I handed him the note. When he asked me to figure the interest, I think I sat down in the same chair he vacated when he took the note. I found the scrap of paper myself to figure the interest. He soon left the room. After I commenced figuring, I don't know what he was doing; he went out in two or three minutes; he had the note in his hands from the time I handed it to him until he left the room; he had his hat on when I went in, and all the time while I was there. I do not know the location of the water closet where he went.

John W. Alling testified as follows: "I went to Fenn's office with a warrant which I drew up upon Mr. Bartlett's complaint; I was well acquainted with Fenn. I said to him: 'I am sorry you took that note. What made you do it?' Fenn said that there had been a fraud played on him by Whitemore, and he took it. I replied: 'Suppose there was, that don't affect Mr. Bartlett or Mr. Warner, who took it before it was due.' Fenn said: 'I do not know about that.' I then said: 'It is a pretty serious thing, it seems to me; in my judgment it is a state's prison offense to take a note in that way.' Fenn then said: 'I will take care of that.' Then I said to Fenn: 'Anyhow, it is nonsense, because your taking the note has not done you any good, for your liability is the same as if you had not got it.' Fenn said: 'Is that so? I supposed if the note was gone, the whole thing was gone, or they could not do anything more about it.' I think I also said: 'You can't pay it in that way.' I then told Fenn he had better give up the note. He then said: 'I have n't it, and cannot give it up, anyway; to tell the truth about it, the note is destroyed.' I asked him what he had done with it, and told him that he had told Bartlett that he had given it to a friend. He said that when he left the office, he went to a

water closet, and put it in the bowl. I suggested that he had better look for it, as it was possible that it was not lost. He said probably there was no use in it, but he would try. He and the officer went and came back and said it was not there. I did not say that I was a prosecuting officer; nothing said about it."

Cross-examined: "I think I first said: 'I am sorry, Mr. Fenn, you took that note, and why did you do it?' He did not say he had taken it, but said Whittemore had wronged him in the transaction out of which the note grew. I knew nothing about any suits then pending. I told him it could not affect Warner or Whittemore, and he said he did not know about that."

George S. Selleck testified as follows: I am a policeman at New Haven. While standing on the street corner near the building in which the accused had his office, Mr. Bartlett spoke to me, and said he would like to have me come up stairs. I did so, and Mr. Bartlett said Mr. Fenn had taken a note from him, and he wished me to remain there in the office till he returned. He went away and after awhile returned. Bartlett then asked Fenn what he had done with the note, and why he did not return it. Fenn said he had put it in the hands of a friend and he could not return it. Bartlett went out and soon after came in with Mr. Alling and an officer, and then Mr. Alling had a conversation with Fenn; he told Fenn he thought he had got himself into trouble by taking the note, and after some conversation that I do not remember, Fenn said he had taken it to the water closet and had destroyed it. At the suggestion of Mr. Alling, Fenn and I went to the water closet and examined it, but could not find the note. We then returned to Fenn's office and Alling handed me a warrant to arrest Fenn, and I arrested him.

William S. Fenn, the accused, testified in his own behalf as follows: The note was given by me to F. J. Whittemore for \$2,300, as part of the consideration on a trade with Whittemore in exchanging land. I agree with the statement of Bartlett and Alling as to what took place at my office. When Bartlett handed me the note I had no intention of destroying it. The water closet is situated at the west end of the hall, on the same floor with my office. I had the note in my hand, and as I rose from the seat, when I threw the paper into the bowl, the note went with it. This note was secured by mortgage.

Cross-examined. I had no intention about the matter when I first took the note from Bartlett. After I had looked at the note and the indorsements, and had asked Bartlett to compute the interest, I had no intention respecting it, and all that I did with the note was an accident, and I meant to have the jury so understand.

The witness further in chief, and on cross-examination, testified to facts tending to show that Whittemore had defrauded him in the exchange of land, for which the note was given, and introduced other evidence to the same point, and claimed to have proved the fraud. The state, on the other hand, to rebut the claim of fraud, offered evidence to prove, and claimed to have proved, that the exchange of land was a fair transaction, and perfectly understood by Fenn, and that there was no fraud whatever.

The foregoing is all the evidence offered on the trial, except evidence on the one hand to show the fraud, and on the other to rebut the claim of fraud, which evidence is not material to any questions now made in the case.

The defendant upon the foregoing evidence requested the court to charge the jury as follows:

1. That the defendant was entitled to an acquittal because a full and particular description of the note was known to the state attorney at the time of instituting the prosecution, and was not given in the information. But the court did not so charge the jury.

2. That the defendant was entitled to an acquittal because the description of the note offered in evidence and the indorsement were each materially variant from the note and indorsement described in the information. But the court did not so charge.

3. That the defendant was entitled to an acquittal because there was no legal evidence introduced to prove that Warner was the owner of the note; but, on the contrary, his blank indorsement on the note showed that the title was not in him; and because there was no evidence that Whittemore ever delivered or indorsed the note to Warner or sold it to him.

The court did not so charge the jury, but charged on this point as follows: "The state is bound to prove, and the jury must be satisfied, from the evidence, beyond a reasonable doubt, that the note in question, when taken by the defendant, was the

